STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

HIEU LUONG and HIEN THI LUONG,

Respondents.

RULING ON MOTION TO DISMISS AFFIRMATIVE DEFENSES

DEC Case No.
R8-2018-0621-66

Appearances of Counsel:

-- Thomas Berkman, Deputy Commissioner and General Counsel (Dusty Renee Tinsley, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Henry S. Stewart, Esq. for respondents

In this administrative enforcement proceeding, Department of Environmental Conservation (DEC or Department) staff charge respondents Hieu Luong and Hien Thi Luong with multiple violations of 6 NYCRR part 663 for depositing fill, grading and clear-cutting trees in a regulated freshwater wetland and adjacent area, at a property owned by respondents and located at 4254 Lyell Road, Gates, New York 14606 (Town of Gates, Monroe County) (site).

On February 25, 2019, Department staff served an amended notice of hearing and amended complaint on respondents. Respondents served and filed a verified answer to the amended complaint, dated March 22, 2019. Respondents' answer contains twelve affirmative defenses.

Department staff moves to dismiss the twelve affirmative defenses pleaded in respondents' answer. For the reasons that follow, Department staff's motion is granted in part, and otherwise denied.

PROCEEDINGS

In a previous proceeding regarding the site, the Commissioner held that respondent Hieu Luong had violated:

A. Consent Order No. R8-2016-1020-97 for failing to:

1. remove soils from the freshwater wetland and adjacent area;
2. plant trees and shrubs in the freshwater wetland and adjacent area;
3. seed and mulch (with 2 inches of straw) the freshwater wetland and adjacent area; and
4. submit documentation to the Department demonstrating that the compliance activities had been completed on schedule;

B. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(20) by placing fill in the freshwater wetland without a permit; and

C. ECL 24-0701(1) and 6 NYCRR 663.3(e) and 663.4(d)(25) by grading portions of the freshwater wetland adjacent area without a permit or letter of permission (*see Matter of Hieu Luong*, Order of the Commissioner, dated September 24, 2018 at 4 [for violations occurring before November 8, 2017]).

Respondent was ordered to pay the suspended penalty set forth in the order on consent in the amount of eight thousand dollars ($8,000), pay a further civil penalty of thirty-three thousand dollars ($33,000), and perform the wetlands restoration requirements detailed in the order (*id.* at 4-5).

In this proceeding, Department staff served a notice of hearing and complaint dated June 26, 2018 on respondent Hieu Luong for violations occurring after November 8, 2017 at the site. Respondent Hieu Luong failed to answer the complaint. Respondent, however, retained counsel who requested permission from Department staff to file a late answer. Staff denied the request. On September 18, 2018, I convened a conference call with the parties, and respondent Hieu Luong was provided the opportunity to file a motion for permission to file a late answer to the complaint. The parties engaged in settlement discussions, and the deadline for filing the motion was stayed indefinitely.

By letter dated January 24, 2019, Department staff requested permission to amend the complaint to add Hien Thi Luong as a respondent because she is also an owner of the site. Respondents opposed staff's motion. By ruling dated February 11, 2019, I granted staff's motion.

On February 25, 2019, Department staff served its amended notice of hearing and amended complaint on respondents. The amended complaint charges respondents with: (i) depositing fill, or authorizing the depositing of fill, in the wetland and adjacent area at the site without a permit in violation of ECL 24-0701(1), 6 NYCRR 663.3(e) and 663.4(d)(20); (ii) grading, or authorizing the grading of, portions of the wetland and adjacent area at the site without a permit in violation of ECL 24-0701(1), 6 NYCRR 663.3(e) and 663.4(d)(25); and (iii) clear-cutting, or authorizing the clear-cutting of, trees in the wetlands and adjacent area at the

site without a permit in violation of ECL 24-0701(1), 6 NYCRR 663.3(e) and 663.4(d)(22). Staff seeks a civil penalty of $605,000 and remedial activities to restore the wetlands and adjacent area.

Respondents filed an answer to the amended complaint dated April 22, 2019. The answer contains denials and the following twelve affirmative defenses:

1. The amended complaint fails to state a claim or a cause of action upon which relief can be granted;
2. a. The wetlands alleged to be on respondents' site were not existing or existent on the respondents' property and were not existent or delineated on the wetlands map, when respondents acquired the property;
   b. The condition or designation of such lands as wetlands came about wholly or partially as a result of illegal or improper acts, actions, activities, inaction, failures, conduct or omissions by the Town of Gates or DEC;
3. a. Any wetlands existing or existent on respondents' property, are and were, if existing, the result of acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates existent or occurring on its park lands contiguous to the respondents' property, particularly involving the creation, construction, improvement, modification or enhancement of the park lands;
   b. Inappropriate or improper conduct of the Town of Gates, individually or in concert with the DEC, with respect to the park lands adjacent to the respondents' property, has negatively impacted respondents' property, for which the respondents are being charged as responsible;
4. a. That all or certain of the acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates were done or undertaken without acquiring permits or environmental impact studies, as required by the DEC or other governmental entities;
   b. Acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates, individually or in concert with the DEC, with respect to the park lands adjacent to respondents' property, caused or exacerbated conditions existing upon or affecting respondents' property, and, to any extent that defects, deficits, deficiencies or improprieties have been made to exist on respondents' property, or to adversely impact contiguous property, such have been caused, in whole or in part, by conduct of the Town of Gates or DEC;
5. DEC engages in prosecution of respondents, knowing that not all required permits were obtained by the Town of Gates with respect to its park lands contiguous to respondents' property, and the acts, actions, activities, inaction, failures, conduct or omissions of or by the Town of Gates on its park lands property have or may have caused conditions existent on respondents' property, under or upon which the respondents are being prosecuted;
6. a. DEC is engaged in prosecution of respondents, simultaneously with contemporaneous prosecution of the Respondents by the Town of Gates;
   b. DEC and the Town of Gates are engaged in wrongfully conspiring to prosecute respondents with respect to alleged wrongdoing on respondents' property;
7. DEC is acting or has acted with "unclean hands" or in bad faith with respect to respondents and their property;
8. DEC, by its prosecution of respondents, is engaged in harassment, ethnic prejudice or bias or discrimination, violation or invasion of privacy rights, violation of civil rights, or other improprieties or illegalities again respondents;
9. DEC is acting or has acted illegally with respect to respondents and their property;

10. There is no fair basis in law or fact for the imposition of the civil penalty and DEC's efforts to allege, assert, seek or recover such an amount of penalty is outrageous, egregious, unreasonable, exorbitant, unjustifiable, unlawful and unconscionable;
11. DEC should be estopped from asserting its allegations, claims or causes of action against respondents; and
12. Respondents assert the right to add additional affirmative defenses.

By notice of motion and motion dated May 9, 2019, Department staff moves, pursuant to 6 NYCRR 622.4(f) for an order dismissing respondents' affirmative defenses. In support of its motion, Department staff submitted the supporting affirmation of Dusty Renee Tinsley, Esq. (Tinsley Affirmation), dated May 9, 2019, with eighteen exhibits attached (*see* Appendix A attached hereto).

Respondents oppose staff's motion through the affirmation of Henry S. Stewart, Esq. (Stewart Affirmation), dated June 21, 2019, with two exhibits attached and the affidavit of Hieu X. Luong (Luong Affidavit), sworn to June 21, 2019 (*see* Appendix A).

Department staff requested and was granted permission to file a reply to respondents' opposition papers. By letter dated July 1, 2019, staff submitted the reply affirmation of Dusty Renee Tinsley, Esq. (Tinsley Reply Affirmation), dated July 1, 2019, and the reply affidavit of Steven Miller (Miller Reply Affidavit), sworn to June 26, 2019, with two exhibits attached (*see* Appendix A).

DISCUSSION

Department staff moves to dismiss the twelve affirmative defenses pleaded in respondents' papers. (*See* Tinsley Affirmation at ¶¶ 16-60.) Staff seeks dismissal of respondents' affirmative defenses on the grounds that they are meritless, or are otherwise vague and ambiguous (or unsubstantiated) and fail to place staff on notice of any facts or legal theory upon which the defenses are based.

The question addressed herein is whether respondents have stated a defense, not whether respondents have complied with technical pleading requirements. Moreover, when deficiencies in the pleadings may be remedied with a remedy less drastic than dismissal, those remedies should be granted (*see Matter of Truisi*, Ruling of the Chief ALJ, April 1, 2010, at 3). Staff's motion and much of staff's argument is based on the language of 6 NYCRR 622.4(f), which sets forth the grounds for clarifying defenses. Staff, however, seeks dismissal not clarification of the affirmative defenses.

Motion to Dismiss Affirmative Defenses

Motions to dismiss affirmative defenses are addressed to the substance of the defense (*see Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]) and are governed by the standards governing motions to dismiss defenses under CPLR 3211(b) (*see Matter of Truisi*, Ruling of the Chief ALJ, April 1, 2010, at 10-11; *Matter of Grout*, Ruling of the Chief ALJ, December 14, 2014, at 10; *Matter of Edkins Scrap Metal Corp.*, Ruling, March 10, 2015, at 21; *Matter of Old Castle, Inc.*, Ruling, February 29, 2016, at 10-11). Motions to dismiss may challenge the

pleading on its face (fails to state a defense) or may seek to establish, with supporting evidence, that a claim or defense lacks merit as a matter of law (*see Matter of Truisi*, at 10).

When staff does not support its motion with evidentiary material, respondents' affirmative defenses will be examined to determine whether defenses are stated. The mere conclusory statement of a defense, however, is insufficient. Respondents must plead the elements of each of their affirmative defenses even though, on a motion to dismiss the defenses, respondents' answer will be liberally construed, the facts alleged accepted as true, and respondents afforded every possible inference (*see Matter of Truisi*, at 10 [citing *Leon v Martinez*, 84 NY2d at 87; *Butler v Catinella*, 58 AD3d 145, 148 (2d Dept 2008)]; *Matter of ExxonMobil Oil Corp.*, ALJ Ruling, Sept. 13, 2002, at 3).[1] A motion to dismiss affirmative defenses will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense (*see Matter of Truisi*, at 10 [*citing Foley v D'Agostino*, 21 AD2d 60, 64-65 (1st Dept 1964)]). Moreover, "if there is any doubt as to the availability of a defense, it should not be dismissed" (*see Matter of Truisi*, at 10 [internal citation omitted]). 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]).

Defenses that merely plead conclusions of law without supporting facts are insufficient to state a defense (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d at 75-80, 84 [1st Dept 2015];[2] *see also* 6 NYCRR 622.4[c] [requiring respondent to explicitly assert any affirmative defense together with a statement of the facts which constitute the grounds of each defense asserted]). Lastly, motions to dismiss may not be used to strike denials (*see Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

1. First Affirmative Defense - failure to state a claim or cause of action upon which relief can be granted.

Department staff argues that failure to state a claim or cause of action upon which relief can be granted is not an affirmative defense and should be dismissed.

Staff is correct that respondents' first affirmative defense is not properly pleaded as an affirmative defense. Rather, this defense is more appropriately pleaded on a motion to dismiss a complaint and merely places Department staff on notice that respondents may move for dismissal in the future (*see Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]; *Pump v Anchor Motor Frgt., Inc.*, 138 AD2d 849, 851 [3rd Dept 1988]; *Salerno v Leica, Inc.*, 258 AD2d 896 [4th Dept 1999]; *Butler v Catinella*, 58 AD3d 145, 150 [2nd Dept 2008]). Until such time as respondents move to dismiss the amended complaint for failure to state a claim, Department staff may safely ignore the defense.

[1] Section 622.4(c) of 6 NYCRR reads: "The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds for each affirmative defense asserted."

[2] The court in *Scholastic Inc. v Pace Plumbing Corp.* discussed the unexplained exception to this general rule created by *Immediate v St. John's Queens Hosp.*, 48 NY2d 671 (1979) (holding that the conclusory affirmative defense of statute of limitations put plaintiff on notice without the need for specifying the limitation period), and the fact that such does not comport with CPLR 3013 (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d at 84).

I also note that all four Judicial Departments deny motions to dismiss this defense because it amounts to an attempt by the plaintiff to test the sufficiency of its own pleadings (*see Matter of Truisi*, at 12; *Matter of Edkins Scrap Metal Corp*., at 3; *Matter of Oldcastle, Inc.*, at 12; *Butler v Catinella*, 58 AD3d at 150 [stating the rule in the First, Second and Third Departments]; *Salerno v Leica, Inc.*, 258 AD2d 896 [4th Dept 1999]).

Accordingly, staff's motion to dismiss respondents' first affirmative defense is denied.

2. Second Affirmative Defense - the wetlands alleged to be on respondents' site were not existing or existent on respondents' property and were not existent or delineated on the wetlands map, when respondents acquired the property but [the alleged wetlands] were wholly or partially created as a result of illegal or improper acts, actions, activities, inaction, failures, conduct or omissions by the Town of Gates or DEC.

Department staff argues that the second affirmative defense does not place staff on notice of the facts or legal theory upon which respondents' defense is based. Staff argues that staff cannot ascertain what and whose conduct is the basis for the defense or when the events occurred. The first half of respondents' second affirmative defense regarding the existence, delineation or mapping of the wetlands is a denial of staff's claim that the wetlands existed on respondents' property when they purchased the property and a denial of staff's claim that the wetlands were delineated on the wetlands map.

Defenses that are actually denials pleaded as defenses are not affirmative defenses on which a respondent bears the burden of proof and are not subject to dismissal on a motion to strike affirmative defenses (*see Matter of Truisi*, Chief ALJ Ruling on Motion to Strike or Clarify Affirmative Defenses, April 1, 2010, at 5, 11; *Matter of Route 52 Property, LLC*, Decision of the Chief ALJ, March 14, 2012, at 19, 22. *Matter of Oldcastle, Inc.* at 13). Accordingly, the motion to dismiss that portion of the second affirmative defense that constitutes a denial is denied.

Respondents argue that respondents should be allowed to assert in their defenses that "the Town's activities in creating its park required permits and that the Town did not obtain all such required permits" (Stewart Affirmation, ¶ 8). Respondent Hieu Luong alleges improper drainage of respondents' property, caused by an undersized culvert under the Town's entrance road to the Town park has caused the wetlands on respondents' property (*see* Luong Affidavit ¶¶ 16 – 28). In staff's reply papers, staff asserts that the Town road has been in existence since at least 1971 and that the road has not been expanded or significantly altered since that time. As a result, the Town's road is exempt from the permitting requirements (*see* Tinsley Reply Affirmation ¶¶ 3 – 6; Miller Reply Affidavit ¶¶ 10 – 12, 14).

The theme running throughout respondents' affirmative defenses is that the wetlands on respondents' property were created by the actions of others, namely the Town of Gates or DEC, whether legally or illegally. Respondents' conclusions presume there is a legal significance to how the wetlands came to be on respondents' property. For the purposes of the violations charged by Department staff in this matter, legal precedent demonstrates that it does not matter whether the wetland is occurring naturally or was created as a result of human activity.

In *Clemente v Jorling*, Decision and Order of the Freshwater Wetlands Appeals Board, Index No. 87-44, April 29, 1992 (1992 WL 554278), the Board concluded that allegedly illegally created wetlands must be included within the wetland boundary. Appellant Clemente argued that portions of the wetland were created due to illegal discharge and blocked culverts and the wetland was thus expanded as a result of illegal hydric inputs. The Board noted that "wetlands are identified, mapped and regulated on the basis of certain physical and biological characteristics. No distinction is made in the statute as to whether the wetland occurs naturally, is created as a result of human construction activities or is created by some other means" (*id.* at *3).

In *Matter of Rappl & Hoenig Co., Inc. v New York State Dept. of Envtl. Conservation*, 61 AD2d 20 (4th Dept 1978), the petitioner argued that if its property has become a freshwater wetland as defined in the Freshwater Wetlands Act (ECL, article 24), such condition was artificially created, and further argued that the Legislature did not intend that the Act be applied to artificially created wetlands. Supreme Court rejected that claim. The Fourth Department recognized that, "[t]o have held otherwise would have restrained the State Commissioner of Environmental Conservation from exercising authority over long established wetlands which may have been created as a result of the construction of cities, suburbs, highways, etc., of this state, a result surely inconsistent with the broad policy and purpose of the Act (ECL 24-0103, 24-0105). It is conceivable that any distinction between 'artificially' or 'naturally' created wetlands has long been blurred by our growth and development" (*id.* at 23). Therefore, the Department may take into account environmental changes as they develop (*id.*).

The purpose of this ruling is to determine whether a defense is stated and if one is stated, whether the defense lacks merit as a matter of law. Therefore, I will not make findings of fact regarding the facts argued by the parties at this point in the proceeding. I conclude, however, based on the discussion above, that respondents' argument that the wetlands were created by the acts or omissions of other is without merit as a matter of law.

To the extent that respondents are arguing that Department staff is engaged in selective enforcement or discriminatory prosecution, the Office of Hearings and Mediation Services has consistently held that the defense of selective enforcement or discriminatory prosecution is not a defense to an administrative proceeding but must be raised in a judicial forum (*see Matter of McCulley*, ALJ Ruling on Motion for Order without Hearing, Sept. 7, 2007, at 7-8).

For the reasons stated above, I conclude that respondents' allegation that the wetlands did not exist on respondents' property and were not delineated on the wetlands map when respondents acquired the property is a denial and Department staff's motion to dismiss that portion of the second affirmative defense is denied. Furthermore, I conclude that respondents' allegation that the Town of Gates or DEC caused the wetlands to be located on respondents' property is without merit as a matter of law. Department staff's motion to dismiss that portion of respondents' second affirmative defense is granted.

3. Third Affirmative Defense - any wetlands existing or existent on respondents' property, are and were, if existing, the result of acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates existent or occurring on its park lands contiguous to the respondents' property, particularly involving the creation, construction, improvement, modification or enhancement of the park lands; and the inappropriate or improper conduct of the Town of Gates, individually or in concert with the DEC, with respect to the park lands

adjacent to the respondents' property, has negatively impacted respondents' property, for which the respondents are being charged as responsible;

Department staff and respondents make the same arguments in support of their respective positions related to the third affirmative defense as they did the second. I also note that this is not the proper forum to adjudicate what the Town of Gates has done on its property. To the extent respondents' affirmative defenses attempt to allege cross-claims and counter-claims, the ECL and the Department's enforcement hearing regulations, 6 NYCRR part 622, do not provide for cross claims, impleaders or counter-claims (*see Matter of Gasco-Merrick Road Gas Corp.*, Ruling of the ALJ, July 21, 2005, at 1; *Matter of David E. Hansen*, Order of the Commissioner, January 3, 2000, *adopting* Hearing Report). Instead, these claims must be pursued in a court of competent jurisdiction (*see Matter of Edivane Franco*, Ruling on Pre-Hearing Motions, June 18, 2008, at 3). To the extent that the third affirmative defense is claiming unclean hands on the part of the Department, that defense is addressed below.

For the reasons stated above and in the discussion of the second affirmative defense, I conclude that respondents' third affirmative defense is without merit as a matter of law. Department staff's motion to dismiss respondents' third affirmative defense is granted.

4. Fourth Affirmative Defense - that all or certain of the aforementioned acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates were done or undertaken without acquiring permits or environmental impact studies, as required by the DEC or other governmental entities. Acts, actions, activities, inaction, failures, conduct or omissions of the Town of Gates, individually or in concert with the DEC, with respect to the park lands adjacent to respondents' property, caused or exacerbated conditions existing upon or affecting respondents' property, and, to any extent that defects, deficits, deficiencies or improprieties have been made to exist on respondents' property, or to adversely impact contiguous property, such have been caused, in whole or in part, by conduct of the Town of Gates or the DEC.

Department staff and respondents make the same arguments in support of their respective positions related to the fourth affirmative defense as they did the second and third. For the reasons stated above in the discussion of respondents' second and third affirmative defenses, I conclude that respondents' fourth affirmative defense is without merit as a matter of law. Department staff's motion to dismiss respondents' fourth affirmative defense is granted.

5. Fifth Affirmative Defense - DEC engages in prosecution of respondents, knowing that not all required permits were obtained by the Town of Gates with respect to its park lands contiguous to respondents' property, and the acts, actions, activities, inaction, failures, conduct or omissions of or by the Town of Gates on its park lands property have or may have caused conditions existent on respondents' property, under or upon which the respondents are being prosecuted.

Department staff and respondents make the same arguments in support of their respective positions related to the fifth affirmative defense as they did the second, third and fourth affirmative defenses. Whether or not the Town of Gates obtained all permits related to its park lands, and whether DEC knew or knows that to be the case, are questions without relevance to this enforcement proceeding and the charges against respondents.

To the extent that respondents are arguing that Department staff is engaged in selective enforcement or discriminatory prosecution, that defense is not a defense to this administrative proceeding but must be raised in a judicial forum (*see Matter of McCulley, at 7-8*).

For the reasons stated above and in the discussion of respondents' second, third and fourth affirmative defenses, I conclude that respondents' fifth affirmative defense is without merit. Department staff's motion to dismiss respondents' fifth affirmative defense is granted.

6. Sixth Affirmative Defense - The DEC is engaged in prosecution of respondents, simultaneously with contemporaneous prosecution of the Respondents by the Town of Gates. DEC and the Town of Gates are engaged in wrongfully conspiring to prosecute respondents with respect to alleged wrongdoing on respondents' property.

Department staff argues that this defense has no merit and states that it is not surprising that the Department and the Town of Gates have on-going enforcement actions against respondents, with the State enforcing State law and the Town enforcing the Town code. Respondents argue that the DEC and Town "have worked together, jointly, to prosecute the Respondents, and there does exist question [sic] as to whether they ever worked together to thwart correct permitting for the construction, long ago, of a roadway into and out of the Town Park and the drainage culvert piping beneath it" (Stewart Affirmation ¶ 16).

It is not uncommon for State and local authorities to coordinate in prosecution of their respective laws against the same individuals as the underlying facts may constitute a violation of state law and a separate violation of local law. This does not a conspiracy make. Respondent Hieu Luong signed a consent order with the Department in June 2017 related to his violation of wetlands law and regulations. He subsequently violated the order by failing to restore the wetlands and adjacent area and continued to commit violations of the wetlands regulations. Staff commenced a proceeding against him culminating in the Commissioner's order against him (s*ee Matter of Hieu Luong, supra*). The present matter alleges further violations of the freshwater wetlands regulations by respondents. Respondents have a history of noncompliance that spans several years and Department staff's attempts to bring respondents into compliance have been ignored. Department staff is authorized by law and regulation to commence enforcement proceedings against those who violate the freshwater wetlands law and regulations. Respondents do not allege elements of any conspiracy. Accordingly, a defense is not stated.

To the extent that respondents raise a malicious prosecution defense, that defense is not available in this administrative process (*see Matter of McCulley*, at 7-8 [and cases cited therein]). I conclude that respondents have not sufficiently stated a defense in respondents' sixth affirmative defense. Department staff's motion to dismiss respondents' sixth affirmative defense is granted.

7. Seventh Affirmative Defense - DEC is acting and/or has acted with "unclean hands" or in bad faith with respect to respondents and their property.

Department staff cites the general rule that equitable defenses, such as unclean hands, are not applicable against an agency acting in a governmental capacity in the discharge of its statutory responsibility (*see* Matter *of Wedinger v Goldberger*, 71 NY2d 428, 440-441, *cert denied* 488 US 850. [1988]; *Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282

[1988]; *see also Matter of Giambrone*, Order of the Commissioner, Dec. 21, 2001, *adopting* ALJ Summary Report, at 25-26). To plead a defense of unclean hands, respondents must allege that the Department has committed some unconscionable act that is directly related to the subject matter of the proceeding and has injured respondents (*see Hytko v Hennessey*, 62 AD3d 1081, 1085-1086 [3d Dept 2009]).

Respondents appear to rely on the allegations contained in the first six affirmative defenses to support their claim of unclean hands or bad faith. Respondents, however, have failed to show some wrongdoing or unconscionable conduct which is proximately related to respondents' alleged violations. As previously decided, wetlands and adjacent areas are present on respondents' property (*see Matter of Hieu Luong*, at 2). Those wetlands were shown on the 1986 map (*id.*). Respondents admittedly purchased the property in 2012. Respondents do not allege that Department staff's conduct caused respondents to clear, fill or grade freshwater wetlands and adjacent area. Applying liberal construction to respondents' seventh affirmative defense, and the papers submitted in response to staff's motion, I find there are insufficient facts alleged or otherwise offered to support the defense that the Department's conduct was unconscionable or that the Department acted in bad faith. Conclusions of law without supporting facts are insufficient to state a defense.

Accordingly, I conclude respondents' seventh affirmative defense of unclean hands is without merit and that respondents have not sufficiently stated a defense. Department staff's motion to dismiss respondents' seventh affirmative defense is granted.

8. Eighth Affirmative Defense - DEC, by its prosecution of respondents, is engaged in harassment, ethnic prejudice or bias or discrimination, violation or invasion of privacy rights, violation of civil rights, or other improprieties or illegalities against respondents.

Department staff argues that respondents have failed to assert any facts supporting respondents' claim that the Department's prosecution of this matter constitutes harassment, ethnic prejudice, bias, discrimination, violation or invasion of privacy rights, violation of civil rights, or other improprieties or illegalities again respondents. Staff is pursuing enforcement against respondents for their alleged clearing, filling and grading of freshwater wetlands and adjacent areas, which are statutory and regulatory violations. In addition, staff argues that the defenses contained in the eighth affirmative defense are not appropriate to consider in an administrative proceeding.

In support of this defense, Mr. Luong states, "[w]hile the Town of Gates and the DEC assert that they are lawfully enforcing provisions of [the Town Code and the ECL], respectively, I respectfully assert that such has constituted and included harassment, bullying, intimidation, and unlawful and discriminatory conduct against me, particularly by the Town of Gates. Such prejudicial conduct has included not just harassment, but ethnic insult and overt and covert racism (Luong Affidavit ¶ 8). Mr. Luong describes in detail examples of this alleged behavior committed by a representative of the Town of Gates (id.). Mr. Luong goes on to state that he has commenced an action in the Monroe County Supreme Court with respect to the alleged conduct against him and his rights (*see* Luong Affidavit ¶ 9). My search of the New York State Unified Court System's eCourts filings reveals that Mr. Luong commenced an action or proceeding against the Town of Gates in 2016 (Index No. 2016/11495) and an action or proceeding against the Town of Gates in 2018 (Index No. 2018005292).

Respondents have not made any specific factual allegation that Department staff engaged in the alleged misconduct and have not alleged that this proceeding was brought as a result of any bias of employees of the Department. The jurisdiction of the Department in this matter is clearly defined in ECL, article 24, title 5 and ECL 71–2303. As noted by staff, the alleged discrimination and civil rights violations arise from alleged conduct of a Town employee, a non-party to this matter, and not a Department employee (*see* Tinsley Reply Affirmation ¶ 10).

Moreover, the precise nature of respondents' eighth affirmative defense is unclear. To the extent the respondents raise a selective enforcement or discriminatory prosecution defense, that defense is not available in this administrative proceeding as a matter of law (*see Matter of McCulley*, at 7-8 [and cases cited therein]). To the extent that respondents raise a malicious prosecution defense, that defense is also not available in this administrative process (*id.*).

Applying liberal construction to respondents' eighth affirmative defense, and the papers submitted in response to staff's motion, I conclude that there are insufficient facts alleged or otherwise offered to support the defense that by enforcing the environmental laws and regulations against respondents, the Department is engaging in harassment, ethnic prejudice or bias or discrimination, violation or invasion of privacy rights, violation of civil rights, or other improprieties or illegalities against respondents. Conclusions of law without supporting facts are insufficient to state a defense.

Accordingly, for the reasons stated above, I conclude that respondents have not sufficiently stated a defense. Department staff's motion to dismiss respondents' eighth affirmative defense is granted.

9. Ninth Affirmative Defense - DEC is acting or has acted illegally with respect to respondents and their property.

Department staff argues that respondents have not alleged any facts in support of respondents' ninth affirmative defense. Staff asserts the defense has no merit because the sole reason for this enforcement proceeding is respondents' alleged clearing, filling and grading of freshwater wetlands and adjacent area. Respondents' answer, the Stewart Affirmation and Luong Affidavit do not allege any facts in support of this affirmative defense.

Department staff's authority to regulate freshwater wetlands and enforce the ECL and regulations is clear (*see* ECL, article 24, title 5 and ECL 71–2303). The ninth affirmative defense is an unsupported conclusion of law. As noted above, defenses that merely plead conclusions of law without supporting facts are insufficient to state a defense.

I conclude that respondents have not sufficiently stated a cognizable defense. Department staff's motion to dismiss respondents' ninth affirmative defense is granted.

10. Tenth Affirmative Defense - there is no fair basis in law or fact for the imposition of the civil penalty and DEC's efforts to allege, assert, seek or recover such an amount of penalty is outrageous, egregious, unreasonable, exorbitant, unjustifiable, unlawful and unconscionable.

Department staff argues that respondents' tenth affirmative defense fails to provide facts constituting the grounds for the defense and that the defense has no merit because the penalty sought is authorized by the ECL. Staff also argues that the alleged defense is not a defense to the violations alleged in the complaint. Respondents argue that respondents should be afforded the right to defend against the civil penalty and contest the basis for the amount requested (Stewart Affirmation ¶ 20).

As stated, respondents' tenth affirmative defense is not a defense against liability, rather it is a defense against the relief requested by staff. It is staff's burden to demonstrate that the civil penalty requested is supported and appropriate. Respondents are allowed to challenge staff's proof in support of staff's request. Respondents are also authorized at hearing to cross-examine staff's witnesses regarding the penalty requested as well as provide testimony and evidence in support of respondents' position. In this instance, I conclude that respondents do not need to plead an affirmative defense to challenge staff's penalty request based on the reasons stated above, but to the extent respondents bear the burden of proving the penalty requested is unreasonable, exorbitant, unjustifiable, and unconscionable, I conclude a defense is stated.

Accordingly, Department staff's motion to dismiss the tenth affirmative defense is denied.

11. Eleventh Affirmative Defense - DEC should be estopped from asserting its allegations, claims or causes of action against respondents.

Department staff cites the general rule of law that estoppel may not be used against a governmental agency discharging its statutory duties (*see Matter of Wedinger v Goldberger*, 71 NY2d 428, 440-441 [1988]; *Waste Recovery Enterprise LLC v Town of Unadilla*, 294 AD2d 766, 768 [3d Dept 2002]), unless it is determined that the Department was guilty of improper conduct upon which the opposing party justifiably relied (*see Matter of Forest Creek Equity Corp. v Department of Envtl. Conservation*, 168 Misc2d 567, 571 [Sup Ct, Monroe County 1996]). Further, estoppel may not be used when the party invoking the doctrine should have been aware of statutory requirements through diligent research (*see Waste Recovery Enterprise LLC*, 294 AD2d at 769; *Matter of Edkins Scrap Metal Corp.*, Ruling, March 10, 2015, at 24).

Respondents "assert that, if the DEC enabled the Town of Gates to avoid obtaining necessary permit, such was improper conduct" (Stewart Affirmation ¶ 19). Respondents' speculative and conclusory statement does not provide the requisite showing that respondents justifiably relied upon that alleged conduct when respondents allegedly cleared, filled and graded the wetlands and adjacent area. In addition, respondents should have been aware of the statutory requirements when they purchased their property. Moreover, respondents were made aware of the regulatory requirements pertaining to wetlands in May 2013 when Department staff delineated the wetlands for respondents and provided respondents with a Freshwater Wetlands Determination. To the extent that this stated defense is a selective enforcement or discriminatory prosecution argument, as noted above, that defense is not available in this administrative proceeding as a matter of law (*see Matter of McCulley, supra*).

Even liberally construing respondents' papers, respondents have not alleged any affirmative misconduct of the Department that respondents relied upon in support of this defense.

Absent that, the defense is not stated. Department staff motion to dismiss respondents' eleventh affirmative defense is granted.

12. Twelfth Affirmative Defense - respondents assert the right to add additional affirmative defenses.

Department staff argues that respondents' twelfth affirmative defense is not a defense. Respondents seek only to reserve a right to assert other affirmative defenses. To assert additional affirmative defenses, however, respondents must move to amend their answer. Amendment of pleadings is governed by 6 NYCRR 622.5.

I conclude that respondents' twelfth affirmative defense is not an affirmative defense. Department staff's motion to dismiss respondents' twelfth affirmative defense is granted.

RULING

Based on the foregoing discussion, my ruling on Department staff's motion to dismiss respondents' affirmative defenses is as follows:

1. Department staff's motion to dismiss respondents' first and tenth affirmative defenses is denied.
2. Department staff's motion to dismiss respondents' second affirmative defense is granted, in part, but is denied to the extent that respondents' second affirmative defense constitutes a denial.
3. Department staff's motion to dismiss respondents' third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth affirmative defenses is granted.

A conference call will be scheduled after the parties have been served with this ruling to schedule the hearing on staff's causes of action and relief requested.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: August 29, 2019
Albany, New York

APPENDIX A

Matter of Hieu Luong and Hien Thi Luong
DEC File No. R8-2018-0621-66
Motion to Dismiss Affirmative Defenses

Department staff's motion papers

- Notice of Motion and Motion to Dismiss Affirmative Defenses, dated May 9, 2019

- Affirmation of Dusty Renee Tinsley, Esq. in Support of Department's Motion to Dismiss Affirmative Defenses, dated May 9, 2019, attaching exhibits 1 – 15:

    1. Cover letter, Notice of Hearing and Complaint, all dated June 26, 2018

    2. Cover letter and Statement of Readiness, all dated August 27, 2018

    3. Letter request for permission to amend the notice of hearing and complaint, dated January 24, 2019, attaching Exhibits 1 – 3:

        1. Copy of cover letter, Notice of Hearing and Complaint, all dated June 26, 2018
        2. 2018 Final Assessment Roll for Town of Gates, Monroe County, New York, page 427
        3. Proposed Amended Notice of Hearing and Amended Complaint

    4. Response to Department staff's request for permission to amend the notice of hearing and complaint, dated February 4, 2019

    5. Department staff's reply to respondents' response, dated February 5, 2019

    6. *Matter of Hieu Luong and Hien Thi Luong*, Ruling on Motion to Amend the Notice of Hearing and Complaint, February 11, 2019

    7. Cover letters, Amended Notice of Hearing and Amended Complaint, all dated February 25, 2019, with signed USPS return receipts, showing receipt on March 12, 2019

    8. USPS Tracking, showing delivery of Amended Notice of Hearing and Amended Complaint on March 12, 2019

    9. Verified Answer to Amended Complaint, verified April 22, 2019

    10. New York State Freshwater Wetlands, "Monroe County Rochester West Map 7 of 21", promulgated on May 29, 1986

11. *Matter of Hieu Luong*, Order of the Commissioner, September 24, 2018 with Default Summary Report, August 24, 2018 attached

12. Email from Dusty Renee Tinsley to Henry S. Stewart, dated January 14, 2019, with Freshwater Wetlands Permit Application Process Sheet for Town of Gates expansion/addition of athletic fields at Gates Town Park, received December 10, 1998

13. NYSDEC DEE-1: Civil Penalty Policy, June 20, 1990

14. NYSDEC DEE-6: Freshwater Wetlands Enforcement Policy, February 4, 1992

15. Copy of Facebook page of Hieu X Luong from October 20, 2017

Respondents' opposition papers

- Affirmation of Henry S. Stewart, Esq. in Opposition to Department's Motion to Dismiss Affirmative Defenses, dated June 21, 2019, attaching Exhibits A – B:

  A. FOIL request responses from NYSDEC
  B. FOIL request responses from Town of Gates

- Affidavit of Hieu X. Luong in Opposition to Department's Motion to Dismiss Affirmative Defenses, sworn to June 21, 2019

Department staff's reply

- Cover letter from Dusty Renee Tinsley, dated July 1, 2019

- Affirmation of Dusty Renee Tinsley, Esq. in Reply to Respondents' Opposition to Department's Motion to Dismiss Affirmative Defenses, dated July 1, 2019

- Affidavit of Steven Miller in Support of the Department's Reply to Respondents' Opposition to Department's Motion to Dismiss Affirmative Defenses, sworn to June 26, 2019, attaching Exhibits 1 – 2:

  1. New York State Freshwater Wetlands Map, "Monroe County Rochester West Map 7 of 21", promulgated on May 29, 1986
  2. Map generated by affiant showing location of respondents' property, boundary of Town Park and location of Gates Town Park access road as of 1971