NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 27 and 71 of the Environmental Conservation Law (ECL) of the State of New York and Section 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

RULING

by

OLDCASTLE, INC., OLDCASTLE MATERIALS, INC. and TILCON NEW YORK, INC.,

DEC Case No. R2-20130827-532

Respondents.

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (John Nehila of counsel), for staff of the Department of Environmental Conservation

-- Sullivan PC (Peter Sullivan of counsel), for respondents Oldcastle, Inc., Oldcastle Materials, Inc. and Tilcon New York, Inc.

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondents Oldcastle, Inc., Oldcastle Materials, Inc. and Tilcon New York, Inc. with failing to: (i) provide daily records of incoming and outgoing solid waste material; (ii) submit a site plan and survey documenting the extent and volume of solid waste materials stored longer than eighteen months; and (iii) remove at least 20,000 cubic yards of solid waste materials stored longer than eighteen months, in violation of an order on consent with respondent Tilcon New York, Inc. (respondent Tilcon) relating to Tilcon's construction and demolition (C&D) debris processing facility located at 980 East 149th Street, Bronx, New York.

Department staff moves for an order striking, or directing clarification of, the nine affirmative defenses pleaded in

respondents' answer. For reasons that follow, Department staff's motion is granted in part, and otherwise denied.

Proceedings

Department staff served a notice of hearing and complaint dated November 18, 2015 on respondents and their attorney followed by service of an amended notice of hearing and amended complaint dated December 3, 2015 on respondents and their attorney. The amended complaint alleges four causes of action related to the alleged violations of a September 16, 2014 order on consent (2014 Order) with respondent Tilcon regarding its C&D debris processing facility.

The amended complaint alleges that respondent Tilcon operates a C&D debris processing facility (facility) at 980 East 149th Street, Bronx, New York. Due to violations at the facility, Department staff and respondent Tilcon entered into the 2014 Order wherein respondent Tilcon admitted the violations noted therein and agreed to pay a $20,000 civil penalty and strictly comply with the conditions contained in the schedule of compliance.

The schedule of compliance required respondent to immediately make payment of the $20,000 penalty; submit copies of the facility's daily records of incoming and outgoing solid waste materials for the years 2011, 2012 and 2013 within thirty days of the execution of the order; and submit a site plan and survey, within thirty days of the effective date of the order, documenting the extent and volume of solid waste materials stored on site longer than eighteen months. After an acceptable survey is provided, respondent Tilcon is required to submit a plan for removal of the solid waste materials stored more than eighteen months. Notwithstanding the requirement to submit a plan for removal of solid waste materials, the 2014 Order requires the removal of 20,000 cubic yards of solid waste materials stored at the facility longer than eighteen months at 365 day intervals from the effective date of the 2014 Order until such solid waste materials have been removed to the satisfaction of the Department.

Respondent Tilcon submitted payment of the $20,000 penalty with the signed 2014 Order. For a first cause of action, staff alleges that respondent Tilcon did not submit copies of the daily records until April 13, 2015, some 178 days after they were due on October 16, 2014. For a second cause of action,

staff alleges that respondent Tilcon failed to submit an acceptable site plan and survey by the October 16, 2014 deadline. For a third cause of action, staff alleges that respondent Tilcon did not remove 20,000 cubic yards of solid waste materials stored for more than eighteen months by September 17, 2015 – the first 365 day milestone. Staff alleges for a fourth cause of action that respondent Tilcon's violation of the 2014 Order constitutes a violation of ECL 71-2703(1)(a).

For the violations charged, Department staff seeks a civil penalty to be determined at hearing but not to exceed the maximum penalty allowed by law or $1,020,000. In addition, staff seeks an order: (i) directing respondent Tilcon to correct and remediate the alleged violations, including the removal of the solid waste materials stored on site more than eighteen months; (ii) withdrawing respondent Tilcon's registration of the facility and requiring respondent Tilcon to obtain a permit for the facility; and (iii) requiring respondent Tilcon to post a surety in an amount to be determined at hearing, sufficient to cover the cost of removal and disposal of the solid waste materials stored on site more than eighteen months.

Respondents filed an answer to the amended complaint dated December 21, 2015. [1] The answer contains specific and general denials and the following nine affirmative defenses:

1. failure to state a claim for which relief can be granted;
2. the alleged contract, which is the subject of the complaint, is illegal and unenforceable;
3. the respondents are not signatories, nor obligated under the agreement noted in the complaint;
4. DEC breached the agreement noted in the complaint;
5. DEC's claims are barred by the applicable statute of limitations;
6. respondents were not aware of and did not suffer or permit the circumstances described in the complaint;
7. DEC's claims are barred by the doctrines of waiver, res judicata or collateral estoppel;
8. the complaint fails to meet the pleading requirements; and
9. in the interest of justice the DEC must be directed to withdraw the above titled action due to the arbitrary and

[1] Respondents' answer states it is an answer to the complaint, but it is clearly an answer to the amended complaint, as the answer denies allegations contained in paragraphs of the December 3, 2015 amended complaint that are not found in the November 18, 2015 complaint.

capricious nature of the actions of the DEC in the regulation of solid waste facilities

By motion dated January 4, 2016, Department staff moves, pursuant to 6 NYCRR 622.4(f) and 622.6(c), for an order striking, or in the alternative, clarifying, respondents' affirmative defenses. In support of its motion, Department staff submitted the supporting affirmation of John Nehila, Esq. (Nehila Affirmation), dated January 4, 2016 with the following exhibits: Exhibit 1, Notice of Hearing and Complaint, dated November 18, 2015, with Order on Consent dated September 16, 2014, Schedule of Compliance and Receipt attached; Exhibit 2, Amended Notice of Hearing and Amended Complaint, dated December 3, 2015; Exhibit 3, Notice of Violation, dated February 25, 2015; and Exhibit 4, Notice of Violation, dated July 20, 2015.

Respondents oppose staff's motion through the affirmation in opposition of Peter Sullivan, Esq. (Sullivan Affirmation), dated January 20, 2016.

By letter dated January 25, 2016, Chief Administrative Law Judge James T. McClymonds advised the parties that the matter had been assigned to the undersigned.

Discussion

Department staff moves to strike or clarify the nine affirmative defenses pleaded in respondents' papers. (See Nehila Affirmation at ¶¶ 10-37.) 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. In the alternative, Department staff seeks clarification of the affirmative defenses pursuant to 6 NYCRR 622.4(f).

The question addressed herein is whether respondents have 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.) For those reasons, Department staff's motion to clarify respondents' affirmative defenses is considered first.

Motion to Clarify Affirmative Defenses

"Department staff may move for clarification of affirmative defenses . . . on the grounds that the affirmative defenses pled in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based." (See 6 NYCRR 622.4[f]). Respondents are required to provide a statement of the facts which constitute the grounds for each of respondents' affirmative defenses (see 6 NYCRR 622.4[c]).

The first question that must be answered on a motion to clarify affirmative defenses is whether the defense pleaded is an affirmative defense or a denial labeled as a defense. If the defense is nothing more than a denial labeled as a defense, clarification is not authorized under part 622 (see Matter of Truisi, at 5). If the defense is an affirmative defense, then it must be determined whether staff is placed on notice of the facts or legal theory upon which respondents' defense is based. In other words, is the affirmative defense specific enough to notify staff of the nature of the defense and the activities or incidents upon which it is based, and in so doing, does it provide staff with an opportunity to respond to the defense?

1. First Affirmative Defense - failure to state a claim for which relief can be granted.

Department staff argues that the first affirmative defense is meritless and should be stricken.

Respondents' first affirmative defense, however, 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]). Because a failure to state a claim does not constitute an affirmative defense, a motion to clarify pursuant to 6 NYCRR 622.4(f) is not available to staff (see Matter of Truisi at 7). Staff's motion to clarify respondents' first affirmative defense is denied.

2. Second Affirmative Defense - the alleged contract, which is the subject of the complaint, is illegal and unenforceable.

Department staff argues that if the "contract" cited by respondents is indeed the 2014 Order, that respondents should have said so. Staff then argues that the 2014 Order was entered into freely by respondent Tilcon and signed by Tilcon. Staff does not expressly argue that the notice provided by this affirmative defense is insufficient.

Respondent does not state a factual basis for this affirmative defense, but instead relies on legal conclusions. Respondents' answer and the Sullivan Affirmation do not allege any facts in support of this affirmative defense. Rather than submitting that the 2014 Order is illegal and unenforceable, respondents merely state that staff's motion indicates the staff has notice of both the facts and underlying theory of the defense.

I conclude that notice of the defense is provided but lacks detail concerning the facts or legal theory upon which the defense is based. In such circumstances, the motion to clarify should be denied and staff directed to utilize discovery to obtain the detail (see Matter of Truisi at 6-7). Accordingly, staff's motion to clarify respondents' second affirmative defense is denied.

3. Third Affirmative Defense - the respondents are not signatories, nor obligated under the agreement noted in the complaint.

Department staff argues the third affirmative defense contains no factual or legal support to "counter Department staff's statements" in the amended complaint relating to respondent Tilcon's operation of the facility, and the relationship between the respondents, and the fact that respondent Tilcon's president signed the 2014 order (see Nehila Affirmation at ¶ 18). Staff asserts that the third affirmative defense fails to place staff on notice of any facts or legal theory upon which it is based.

Respondents assert that respondent Oldcastle, Inc. and respondent Oldcastle Materials, Inc. were "not signatories, nor obligated under the agreement" and argue that staff admits it has requisite notice and staff's argument demonstrates staff is on notice of the defense (see Sullivan Affirmation at ¶ 24). I

disagree with respondents' portrayal of staff's admission or argument.

In this instance, however, respondents' third affirmative defense is a denial labeled as a defense. Department staff has the burden of proving that respondents violated the 2014 Order. The defense denies that two of the respondents were party to the 2014 Order, but calling it an affirmative defense does not shift the burden from Department staff to respondents.

Because the third defense is not an affirmative defense, clarification is not authorized under 6 NYCRR 622.4(f). Staff's motion to clarify respondents' third affirmative defense is denied.

4. Fourth Affirmative Defense - DEC breached the agreement noted in the complaint.

Department staff asserts that the defense offers no factual or legal basis in support of the claimed defense, that the defense is otherwise vague and does not provide sufficient notice to staff of any fact or legal theory upon which it is based.

Respondents state that the defense is clear on its face and that breach of contract is the legal theory upon which the defense is based. As examples, respondents cite instances of DEC's bad faith refusal to accept multiple surveys submitted in compliance with the 2014 Order and its bad faith insistence that the 2014 Order requires removal of all material from the site. (See Sullivan Affirmation at ¶ 28).

Applying liberal construction to respondents' papers, I conclude the Sullivan Affirmation supplements an inartfully pleaded answer and provides sufficient notice to Department staff of the nature of the defense and the activities or incidents upon which it is based. Department staff's motion to clarify respondents' fourth affirmative defense is denied.

5. Fifth Affirmative Defense - DEC's claims are barred by the applicable statute of limitations.

Department staff argues that respondents' have failed to state what statute of limitations is applicable to respondent Tilcon's alleged violation of the 2014 Order or the alleged violations of statutes and regulations cited in the amended complaint. Staff claims the defense is vague and

unsubstantiated and fails to place staff on notice of the facts or legal theory upon which the defense is based.

Respondents do not provide any further information regarding this defense in the Sullivan Affirmation. Nonetheless, the affirmative defense is sufficiently specific to place Department staff on notice that respondents intend to raise a statute of limitations defense. Accordingly, the motion to clarify respondents' fifth affirmative defense is denied. Department staff's assertion that respondents failed to plead facts and law sufficient to support the defense is addressed below on staff's motion to dismiss.

6. Sixth Affirmative Defense - respondents were not aware of and did not suffer or permit the circumstances described in the complaint.

Department staff argues that the defense contains no factual or legal support to counter staff's allegations that respondents are responsible for compliance with the 2014 Order. Staff asserts that the sixth affirmative defense is vague and ambiguous and fails to place staff on notice of any facts or legal theory upon which it is based.

Respondent argues that the defense is its legal theory and 6 NYCRR 622.4(f) does not require that any notice of the facts be combined with that theory. I disagree. Respondents' sixth affirmative defense is not a legal theory, rather it is a denial labeled as a defense. As such, clarification is not authorized under 6 NYCRR 622.4(f). Staff's motion to clarify respondents' third affirmative defense is denied.

7. Seventh Affirmative Defense - DEC's claims are barred by the doctrines of waiver, res judicata and/or collateral estoppel.

Department staff argues that the defense contains no factual or legal justification to support Respondents' contention that the Department's claims are barred by any of the three named legal doctrine.

Again respondent argues that 6 NYCRR 622.4(f) does not require any notice of facts be combined with those legal theories. Respondents further argue that DEC's bad faith refusal to accept multiple surveys submitted in compliance with the 2014 Order and its bad faith insistence that the 2014 Order

requires removal of all material from the site support the doctrines identified in the seventh affirmative defense.

The affirmative defense is sufficiently specific to place Department staff on notice that respondents intend to raise a waiver, res judicata and collateral estoppel as defenses. Accordingly, the motion to clarify respondents' seventh affirmative defense is denied. Department staff's assertion that respondents failed to plead facts and law sufficient to support the defense is addressed below on staff's motion to dismiss.

8. Eighth Affirmative Defense - the complaint fails to meet the pleading requirements.

As staff points out, this defense does not identify what pleading requirements have not been met. Staff further avers that the amended complaint meets the requirements of 6 NYCRR 622.3(a)(1) and CPLR 3013. Staff argues that this defense is vague and ambiguous and fails to place staff on notice of any facts or legal theory upon which it is based.

The Sullivan Affirmation does not address staff's motion regarding the eighth affirmative defense and does not provide any explanation of the defense.

I conclude that respondents' eighth affirmative defense is not properly pleaded as an affirmative defense. Similar to the first affirmative defense of failure to state a claim, this defense is more appropriately pleaded on a motion to dismiss a complaint. As failure to meet the pleading requirements does not constitute an affirmative defense, a motion to clarify pursuant to 6 NYCRR 622.4(f) is not available to staff. Staff's motion to clarify respondents' eighth affirmative defense is denied.

9. Ninth Affirmative Defense - in the interest of justice the DEC must be directed to withdraw the above titled action due to the arbitrary and capricious nature of the actions of the DEC in the regulation of solid waste facilities.

Again, staff argues that there is no factual or legal support to this defense and respondents have failed to identify what actions or facilities are being referenced. Staff argues that this defense is vague and ambiguous and fails to place staff on notice of any facts or legal theory upon which it is based.

In response, respondents assert that the "legal theory of the defense is clear on its face that it is 'dismissal in the interests of justice due to the arbitrary and capricious nature of the action by DEC'" (see Sullivan Affirmation at ¶ 36.) Respondents assert that among the facts that will be argued in support of this "legal theory of dismissal in the interests of justice" are DEC's bad faith refusal to accept multiple surveys submitted in compliance with the 2014 Order and its bad faith insistence that the 2014 Order requires removal of all material from the site.[2]

I conclude that respondents' ninth affirmative defense is not properly pleaded as an affirmative defense. Similar to the first and eighth affirmative defenses, dismissal in the interest of justice is more appropriately pleaded on a motion to dismiss a complaint. Because dismissal in the interest of justice does not constitute an affirmative defense, a motion to clarify pursuant to 6 NYCRR 622.4(f) is not available to staff. Accordingly, staff's motion to clarify respondents' ninth affirmative defense is denied.

Motion to Dismiss Affirmative Defenses

In contrast to motions to clarify affirmative defenses, which address only the sufficiency of the notice provided by the affirmative defense, 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]). Staff's motion to strike the affirmative defenses is actually a motion to dismiss affirmative defenses (compare CPLR 3024[b] and 3211[b]) and as such is 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 of the ALJ, March 10, 2015, at 21.) Motions to dismiss may challenge the pleading on its

[2] The dismissal in interest of justice is codified in Criminal Procedure Law (CPL) § 210.40 "Motion to dismiss indictment; in furtherance of justice". The law authorizes a court, on motion, to dismiss an indictment or count "when, even though there may be no basis for dismissal as a matter of law . . , such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice." (CPL § 210.40[1]; see also CPL § 170.40). The CPL has not been incorporated into 6 NYCRR part 622 and is not applicable to this administrative enforcement proceeding.

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, supra 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.)[3] 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 80 and 84 [1st Dept 2015];[4] 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]).

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[3] 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."

[4] 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).

The affirmative defenses stated in respondents' answer are merely conclusions of law with no facts alleged in support of the legal conclusions. Therefore, the submissions must be searched to determine if the affirmative defenses have been stated. The submissions include the Sullivan Affirmation and respondents' answer.

Before addressing each affirmative defense asserted by respondents, respondents' general opposition to staff's motion to dismiss the affirmative defenses must be addressed. Respondents assert throughout the Sullivan Affirmation that there is no legal or regulatory support for Department staff's motion to strike respondents' affirmative defenses. As indicated above, staff's motions to strike affirmative defenses in enforcement hearings pursuant to 6 NYCRR part 622 have been reviewed and treated as motions to dismiss the affirmative defenses. (See Matter of Truisi, at 10-11; Matter of Grout, at 10; Matter of Edkins Scrap Metal Corp., at 21.) I do the same here. Accordingly, I reject respondents' repeated assertion that there is no legal basis for staff's motion.

1. First Affirmative Defense – Failure to state a claim for which relief can be granted.

Department staff argues that the affirmative defense of failure to state a claim for which relief can be granted should be dismissed. As discussed above, failure to state a claim does not constitute an affirmative defense, it is more appropriately pleaded on a motion to dismiss a complaint. Until such time as respondents move to dismiss the amended complaint for failure to state a claim, Department staff may safely ignore the defense.

Moreover, all four Judicial Departments now 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; 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 alleged contract, which is the subject of the complaint, is illegal and unenforceable.

As stated above, Department staff argues that if the "contract" cited by respondents is indeed the 2014 Order, that

the 2014 Order was entered into freely by respondent Tilcon and signed by Tilcon.

Respondents' answer and the Sullivan Affirmation do not allege any facts in support of this affirmative defense. Taking respondents answer and Sullivan Affirmation as a whole, however, respondents do argue that two of the respondents did not sign and were not a party to the 2014 Order. I conclude that respondents have sufficiently stated a cognizable defense. Department staff's motion to dismiss respondents' second affirmative defense is denied.

3. Third Affirmative Defense – The respondents are not signatories, nor obligated under the agreement noted in the complaint.

As discussed above, respondents' third affirmative defense is a denial labeled as an affirmative defense. 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.) Accordingly, the motion to dismiss respondents' third affirmative defense is denied.

4. Fourth Affirmative Defense – DEC breached the agreement noted in the complaint.

Respondents allege that Department staff through its bad faith refusal to accept multiple surveys submitted in compliance with the 2014 Order and staff's insistence that the language and intent of the order require the removal of all material from the site breached the 2014 Order. These alleged facts are sufficient to state a cognizable defense. Staff's motion to dismiss respondents' fourth affirmative defense is denied.

5. Fifth Affirmative Defense – DEC's claims are barred by the applicable statute of limitations.

It is well settled that the CPLR statute of limitations provisions only apply to civil judicial proceedings. None of the CPLR article 2 provisions have been incorporated into 6 NYCRR Part 622. In short, the limitation periods established by the CPLR are not applicable to this administrative enforcement proceeding. (See Matter of Stasack, Ruling of the Chief ALJ,

December 30, 2010 at 9; Matter of Edkins Scrap Metal Corp. at 19 and 23.)

Respondents failed to identify any other applicable statute of limitations. Accordingly, this proceeding is distinguishable from the Court of Appeals decision in Immediate v St. John's Queens Hosp., 48 NY2d 671 (1979). In that case, the conclusory allegation that a claim is barred by the statute of limitations was deemed sufficient to put plaintiff on notice of the alleged defense. In this proceeding, there are no applicable CLPR statute of limitations provisions, therefore, it was incumbent on respondents to particularize the defense rather than remain silent on the basis for this defense. Staff's motion to dismiss respondents' fifth affirmative defense is granted.

6. Sixth Affirmative Defense – Respondents were not aware of and did not suffer or permit the circumstances described in the complaint.

Respondents' sixth affirmative defense constitutes a denial, not an affirmative defense. As discussed above, 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. Accordingly, the motion to dismiss respondents' sixth affirmative defense is denied.

7. Seventh Affirmative Defense – DEC's claims are barred by the doctrines of waiver, res judicata and/or collateral estoppel.

The seventh affirmative defense states three defenses, waiver, res judicata and collateral estoppel. Respondents argue that DEC's bad faith refusal to accept multiple surveys submitted in compliance with the 2014 Order and its bad faith insistence that the 2014 Order requires removal of all material from the site support the doctrines identified in the seventh affirmative defense. I disagree.

Respondents have not pleaded any elements of waiver, res judicata or collateral estoppel. Respondents do not point to any previous matter that would preclude the Department from enforcing alleged violations of the 2014 Order or allege any specific act that constitutes an element of one of these three affirmative defenses.

Moreover, 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, Ruling of ALJ, March 17, 1993.)

Generally speaking, res judicata (claim preclusion) and collateral estoppel (issue preclusion) require respondents to demonstrate that the matter or issue was previously decided between the parties. Here respondents have not identified a previous judgment or order, or previously decided claim or issue, preventing Department staff from enforcing the violations alleged herein.

Department staff's motion to dismiss the three defenses alleged in respondents' seventh affirmative defense is granted.

8. Eighth Affirmative Defense – The complaint fails to meet the pleading requirements.

As discussed above, respondents' eighth affirmative defense is not properly pleaded as an affirmative defense. Similar to the defense of failure to state a claim, this defense is more appropriately pleaded on a motion to dismiss a complaint.

Additionally, a motion to dismiss this defense appears to suffer from the same infirmities as a motion to dismiss the defense of failing to state a claim. It amounts to an attempt by the plaintiff to test the sufficiency of its own pleadings. For those reasons, staff's motion to dismiss respondents' eighth affirmative defense is denied.

9. Ninth Affirmative Defense – in the interest of justice the DEC must be directed to withdraw the above titled action due to the arbitrary and capricious nature of the actions of the DEC in the regulation of solid waste facilities.

Respondents' ninth affirmative defense is not properly pleaded as an affirmative defense. As discussed above, this defense is more appropriately pleaded on a motion to dismiss a complaint.

Department staff can safely ignore this defense until such time as respondents bring a motion to dismiss the amended complaint. Accordingly, staff's motion to dismiss respondents' ninth affirmative defense is denied.

RULING

Department staff's motion, to the extent it seeks clarification of respondents' affirmative defenses is denied for the reasons stated above.

Department staff's motion, to the extent it seeks dismissal of respondents' fifth and seventh affirmative defenses is granted. The motion to dismiss is otherwise denied for the reasons stated above.

/s/
Michael S. Caruso
Administrative Law Judge

Dated: February 29, 2016
Albany, New York