STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL)

- by -

WILLIAM STASACK and STEPHEN STASACK,

Respondents.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE

DEC File No. R4-2003-1023-117

December 30, 2010

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Jill T. Phillips of counsel), for staff of the Department of Environmental Conservation

-- Stephen A. Stasack, respondent pro se and for respondent William Stasack

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR CLARIFICATION AND TO STRIKE AFFIRMATIVE DEFENSES

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department) alleges that respondents William Stasack and Stephen Stasack violated Environmental Conservation Law (ECL) article 15 by placing fill into navigable waters on property located in the Town of Grafton, Rensselaer County, adjacent to South Long Pond and Dyken Pond. Department staff moves for clarification and to strike affirmative defenses pleaded in respondents' answer. For the reasons that follow, staff's motion is granted in part and otherwise denied.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated July 1, 2010. In the complaint, staff alleges that respondents William Stasack and Stephen Stasack own property located at 45 Benker School Way, Town of Grafton,

Rensselaer County (Tax Map Parcel # 107.-2-23) (the site), adjacent to South Long and Dyken Ponds (the Pond). Staff further alleges that the Pond is a navigable body of water as defined in section 608.1(u) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Staff charges that respondents constructed an approximately 50 foot long jetty, placed large rocks into the Pond, and disturbed the shoreline along the width of the site without a permit, in continuing violation of ECL 15-0505(1) and 6 NYCRR 608.5. Staff seeks a civil penalty in the amount of $10,000, and remediation of the site.

Respondents filed an answer and affirmative defenses dated July 15, 2010. In their answer, respondents denied the material elements of the complaint, including the allegations that respondents own the property at issue, or that the Pond is a navigable water. Respondents also pleaded nine affirmative defenses.

By motion dated July 23, 2010, staff moves to strike the affirmative defenses or, in the alternative, for clarification of those defenses. In response, respondents filed an affidavit of respondent Stephen A. Stasack, together with supporting documentation. The matter was assigned to the undersigned Chief Administrative Law Judge (ALJ) as presiding ALJ.

DISCUSSION

In a series of recent rulings, the standards applicable to motions for clarification and to strike affirmative defenses under part 622 of 6 NYCRR (Part 622) have been discussed (see, e.g., Matter of Mustang Bulk Carrier, Inc., Order of the Acting Commissioner, Nov. 10, 2010, adopting Chief ALJ Ruling and Summary Report; Matter of Truisi, Chief ALJ Ruling on Motion, April 1, 2010). As stated in those rulings, motions to clarify affirmative defenses under 6 NYCRR 622.4(f) are addressed to the sufficiency of the notice provided by the pleading (see, e.g., Truisi, at 4, 6-7). They are not an opportunity for staff to obtain, in effect, a bill of particulars, which are prohibited by Part 622 (see id. at 7 n 2; 6 NYCRR 622.7[b][3]). If an affirmative defense provides staff with sufficient notice of the nature and basis of the defense, staff must use available discovery devices to obtain any further detail concerning the defense (see id. at 6-7; see also Matter

of Bath Petroleum Storage, Inc., ALJ Ruling on Motion to Clarify Affirmative Defenses, Jan. 27, 2005, at 10, 12).

Motions to strike affirmative defenses, on the other hand, are governed by the standards applicable to motions to dismiss defenses under CPLR 3211(b) (see, e.g., Truisi, at 10-11).[1] In general, motions to dismiss affirmative defenses may challenge the pleading facially -- that is, on the ground that it fails to state a defense -- or may seek to establish, with supporting evidentiary material if necessary, that a defense lacks merit as a matter of law (see id. at 10).

The threshold inquiry on a motion to dismiss or clarify affirmative defenses is whether the defense pleaded is, in fact, in the nature of an affirmative defense (see id. at 4-5; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38). Where the defense is actually a denial pleaded as a defense, a motion to dismiss or clarify affirmative defenses does not lie (see Truisi, at 5, 11; see also Rochester v Chiarella, 65 NY2d 92, 101 [1985] [motion to dismiss not a vehicle to strike a denial]).

Assuming the defense is in the nature of an affirmative defense, a pleading challenged on the ground that it fails to state a defense is liberally construed (see Truisi, at 10 [citing Leon v Martinez, 84 NY2d 83, 87 (1994); Butler v Catinella, 58 AD3d 145, 148 (2d Dept 2008)]). The facts alleged are accepted as true and the pleader is afforded every possible inference (see id.; Matter of ExxonMobil Oil Corp., ALJ Ruling, Sept. 13, 2002, at 3). A motion to dismiss will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense (see Truisi, at 10 [citing Leon, 84 NY2d at 87-88; Foley v D'Agostino, 21 AD2d 60, 64-65 (1st Dept 1964)]). In addition, affidavits submitted in opposition to the motion may be used to save an inartfully pleaded, but potentially meritorious, defense (see Faulkner v City of New York, 47 AD3d 879, 881 [2d Dept 2008]).

Pure legal conclusions are not presumed to be true, however (see Truisi, at 10-11 [citing Bentivegna v Meenan Oil Co., 126 AD2d 506, 508 (2d Dept 1987)]). Thus, defenses that

[1] Thus, I agree with respondents that summary judgment standards are not applicable on this motion. Nor have I converted this motion to one for summary judgment. Rather, I apply settled standards and principles governing motions to dismiss defenses.

merely plead conclusions of law without supporting facts are insufficient to state a defense (see id. [citing Bentivegna, 126 AD2d at 508; Glenesk v Guidance Realty Corp., 36 AD2d 852, 853 (2d Dept 1971)]; 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]).

Applying these general principles, respondents' affirmative defenses and Department staff's objections are examined in turn.

I. First Affirmative Defense

In their first affirmative defense, respondents assert that the Department lacks jurisdiction of the subject matter of the complaint on the ground that South Long Pond is not a navigable body of water. Staff challenges this defense on the ground that it is vague and ambiguous, and fails to place staff on notice of the facts or legal theory upon which the defense is based.

In its complaint, staff charges that respondents violated ECL 15-0501(1) and 6 NYCRR 608.5. ECL 15-0501(1) provides that "[n]o person . . . shall excavate or place fill below the mean high water level in any of the navigable waters of the state . . . without a permit issued" by the Department. Similarly, 6 NYCRR 608.5 provides that "[n]o person . . . may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the State . . . without a permit issued" by the Department. Whether the Pond at issue is a "navigable water" is an element of the charge that staff has the burden of proving (see 6 NYCRR 622.11[b][2]). Respondents' first affirmative defense is in the nature of a denial of an element of the charge and, thus, is not subject to dismissal or clarification (see Truisi, at 8-9, 12-13). Accordingly, staff's motion to strike or clarify the first affirmative defense should be denied.

II. Second Affirmative Defense

In their second affirmative defense, respondents assert that the Department lacks jurisdiction because

respondents do not own the property described in the complaint, and that the owners of that property are necessary parties who have not been joined as respondents. Staff challenges the second affirmative defense on the grounds that respondents have failed to identify who the other owners are, that staff has discretion to determine which parties to prosecute, and that staff is prepared to present evidence of respondents' ownership of the site.

In its complaint, staff alleges that respondents are the owners of the site where the alleged illegal construction of a jetty, placement of large rocks, and disturbance of the shoreline adjacent to a navigable water body took place. Respondents' assertion that they do not own the site is, again, a denial of a material element of Department staff's charge. Thus, to the extent the second affirmative defense denies ownership, it is a denial labeled as an affirmative defense and, thus, is not subject to dismissal or clarification. Thus, the motion should be denied in relevant part.

To the extent the second affirmative defense alleges that necessary parties have not been joined, this assertion is in the nature of an affirmative defense (see Ramsey v Ramsey, 69 AD3d 829, 833 [2d Dept 2010]). However, the affirmative defense lacks merit as pleaded in this proceeding. Assuming without deciding that nonjoinder of necessary parties is an available defense under Part 622, respondents fail to state any facts tending to establish that they would be prejudiced by the absence of the other owners, or that complete relief between respondents and the Department cannot be granted in the absence of the other owners (see Matter of Huntington and Kildare, Inc., Chief ALJ Ruling on Motion to Allow Third Party Claim, Nov. 15, 2006, at 4-5). To the extent respondents require examination of the other owners -- identified in respondents' opposing affidavit as Adolf Scholl and Henry Benker, or their heirs and assigns -- respondents may subpoena them as witnesses (see id.). Thus, respondents fail to state a defense of failure to join necessary parties, and Department staff's motion to dismiss should be granted to the extent of dismissing that portion of the second affirmative defense as pleaded the defense.

III. Third Affirmative Defense

In their third affirmative defense, respondents allege that by filing criminal charges against respondent William Stasack in 2003, the Department has elected its remedy. Respondents further allege that the criminal complaint was resolved in Grafton Town Court by a $100 fine paid upon a guilty plea to a violation of ECL 71-4001. Respondents assert that although the Department originally sought the same remediation demanded in this proceeding, the request for remediation was withdrawn as part of the settlement in the criminal proceeding.

Department staff objects that the third affirmative defense is vague and ambiguous, and fails to place the Department on notice of the facts or legal theory upon which it is based. I disagree. The defense is sufficiently clear to place the Department on notice of two theories: (1) election of remedies and (2) compromise and settlement of the requested remediation in the criminal proceeding. Thus, staff's motion to clarify the third affirmative defense should be denied.

On the merits, staff argues that respondents' election of remedies defense lacks merit. Staff correctly points out that the ECL provides for both criminal and civil penalties and remedial obligations for violations of ECL article 15 that are enforceable in criminal, civil, or administrative proceedings (see ECL 71-1103; 71-1107; ECL 71-1127; ECL 71-4003). It is settled law that where criminal and civil sanctions are available to an agency, choice of one is not an election barring the other (see Town of Southampton v Sendlewski, 156 AD2d 669, 670 [2d Dept 1989]). Thus, respondents' election of remedies defense should be dismissed on the ground that it lacks merit.

On the other hand, the Department has the authority to seek either criminal or civil sanctions and, thus, has the authority to compromise both criminal and civil claims (cf. Czajka v Breedlove, 200 AD2d 263, 265 [3d Dept], lv denied 84 NY2d 809 [1994]). By alleging that the Department withdrew its request for remediation as part of the settlement of the criminal proceeding, respondents state a valid defense of compromise and settlement. In response, Department staff failed to establish that respondents' defense lacks merit as a matter of law. Thus, the motion to strike respondents' compromise and settlement defense should be denied.

IV. Fifth Affirmative Defense[2]

In its fifth affirmative defense, respondents deny that they placed any fill in or excavated any material from South Long Pond. Respondents allege that other persons placed material in and moved material around South Long Pond prior to respondents' ownership of the adjoining parcel. Respondents further allege that any material forming the alleged jetty came from the site and was relocated to make the site safer for recreational activities.

Department staff concedes that the fifth affirmative defense is actually a denial labeled as an affirmative defense. Nonetheless, citing Matter of Gramercy Wrecking and Envtl. Contrs., Inc. (ALJ Ruling, Jan. 14, 2008, at 9), staff requests that the denial be dismissed or clarified. Dismissal of a denial denominated an affirmative defense is inconsistent, however, with settled law governing motions to dismiss affirmative defenses (see Truisi, at 11 [citing Rochester v Chiarella, 65 NY2d 92, 101 (1985)]; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38, at 59). The appropriate vehicle for seeking dismissal of a denial is a motion for an order without hearing, which is the Departmental equivalent of summary judgment (see id.). Similarly, Part 622 only authorizes clarification of affirmative defenses, not denials (see 6 NYCRR 622.4[f]; Truisi, at 4-5). If staff needs clarification of respondents' denials, its recourse is discovery. Accordingly, staff's motion to strike or clarify the fifth affirmative defense should be denied.

V. Sixth Affirmative Defense

In their sixth affirmative defense, respondents raise the defense of selective enforcement. Department staff correctly notes that the Office of Hearings and Mediation Services has consistently held that the defense of selective enforcement is not a defense to the underlying prosecution (see, e.g., Matter of McCulley, Chief ALJ Ruling on Motion for Order Without Hearing, Sept. 7, 2007, at 8 [citing Matter of 303 West 42nd St. Corp. v Klein, 46 NY2d 686, 693 & n 5 (1979)]; Matter of Berger, ALJ Ruling, Feb. 17, 2009, at 9).

[2] Respondents' answer does not contain a defense denominated as the "fourth" affirmative defense.

Thus, respondents' sixth affirmative defense should be dismissed.

VI. Seventh Affirmative Defense

In their seventh affirmative defense, respondents alleged that any relocation of rock on their property was done above the mean high water mark of South Long Pond and, therefore, no permit was required for their activity. Department staff asserts that respondents failed to provide any reference to a legal theory that would support this claim and, therefore, the defense should be clarified or struck.

As required by Part 622, respondents pleaded their defense based upon the inapplicability of the permit requirement to the activity charged as an affirmative defense (see 6 NYCRR 622.4[c]). Moreover, the factual allegations of the answer together with respondents' amplification of the defense in their affidavit in opposition to staff's motion are sufficient to state the defense and otherwise place staff on notice. As noted by respondents, both ECL 15-0505(1) and 6 NYCRR 608.2(a) require a permit for the excavation or placement of fill below the mean high water mark of any navigable waters of the State. Respondents' allegation that any placement of rock on their property was done above the mean high water mark of South Long Pond is sufficient to state the defense. Accordingly, staff's motion to clarify or strike respondents' seventh affirmative defense should be denied.

VII. Eighth Affirmative Defense

In their eighth affirmative defense, respondents assert that the Department is guilty of laches in that staff unnecessarily delayed in commencing this proceeding. Respondents also allege that they are prejudiced in defending this action because witnesses have sold their property and moved away, and evidence is no longer available that would aid in the defense of this action.

Department staff is correct that the equitable defense of laches is not available against a State agency acting in a governmental capacity to enforce a public right (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2

[1985], cert denied 476 US 1115 [1986]). Thus, to the extent the eighth affirmative defense pleads a laches defense, it should be dismissed.

However, respondents have sufficiently pleaded a Cortlandt defense based upon administrative delay. To plead a defense based upon Cortlandt, a respondent must allege not only a relevant delay, but a significant and irreparable prejudice to the respondent's defense of the proceeding resulting from the delay (see id. at 177-178, 180-181; Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11-13; Truisi, at 11). Here, respondents have alleged delay and substantial prejudice in the defense of this proceeding resulting from the loss of witnesses. Thus, respondents have provided sufficient factual allegations to state a defense of administrative delay and place Department staff on notice of the defense. Department staff may use available discovery devices to obtain further clarification or amplification of the defense. Department staff's motion to strike or clarify the remainder of the eighth affirmative defense should be denied.

VIII. Ninth Affirmative Defense

In their ninth affirmative defense, respondents assert that the "statute of limitations bars the commencement of the proceeding." In support of this affirmative defense, respondents reference CPLR 213 and 214(2). As Department staff correctly note, the CPLR and, thus, its statute of limitations provisions, is applicable only to civil judicial proceedings (see CPLR 101; CPLR 105[d]). Neither CPLR 213 nor CPLR 214(2) has been incorporated into Part 622. Thus, the limitation periods established by the CPLR are not applicable to this administrative enforcement proceeding (see Matter of Gaul, Rulings of the ALJ, Jan. 12, 2009, at 3-4). Moreover, respondents have failed to identify any other applicable statute of limitations (see Matter of Crow Props., L.L.C., Ruling of the Chief ALJ on Motion and Cross Motion, Dec. 20, 2010, at 8). Thus, respondents' fail to state a valid statute of limitations defense and the defense should be dismissed.

IX. Tenth Affirmative Defense

In their tenth affirmative defense, respondents plead that this proceeding is barred by res judicata or collateral estoppel because in a prior proceeding, the Department conceded that South Long Pond has no public access and, therefore, is not a navigable body of water. In their affidavit in opposition to staff's motion, respondents alleged that in papers filed in the criminal proceeding against respondent William Stasack in Grafton Town Court, the Department stated that South Long Pond was surrounded by private property and had no public access, and that these facts cannot now be disputed.

In its response, Department staff asserts that the doctrine of estoppel may not be used against the Department. Although staff is correct that the doctrine of equitable estoppel generally cannot be invoked against the State (see Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Martino, ALJ Rulings, April 28, 2008, at 3-4), respondents do not plead equitable estoppel. Instead, respondents plead the defenses of res judicata (claim preclusion) and collateral estoppel (issue preclusion), both of which may be applicable in administrative proceedings (see Matter of McCulley, at 4-5).

Nonetheless, respondents' answer and affidavit in opposition to staff's motion lack sufficient allegations to state a valid defense of either res judicata or collateral estoppel. Respondents fail to allege any basis for concluding that respondent William Stasack's guilty plea in the prior criminal proceeding bars this civil administrative proceeding against both respondents, or that issues were necessarily decided against the Department in the criminal proceeding (cf. S.T. Grand, Inc. v City of New York, 32 NY2d 300, 304-305 [1973]; Vavolizza v Krieger, 33 NY2d 351, 355-356 [1974]). At most, the Department's allegations contained in its criminal complaint against respondent William Stasack would constitute informal judicial admissions admissible in this administrative proceeding (see Cramer v Kuhns, 213 AD2d 131, 138 [3d Dept], lv dismissed 87 NY2d 860 [1995]). Thus, respondents' tenth affirmative defense should be dismissed on the ground that the defenses of res judicata and collateral estoppel are not stated.

RULING

Department staff's motion to strike affirmative defense is granted in part. The defenses of failure to join necessary parties (a portion of respondents' second affirmative defense), election of remedies (a portion of the third affirmative defense), selective enforcement (the sixth affirmative defense), laches (a portion of the eighth affirmative defense), statute of limitations (the ninth affirmative defense), res judicata, and collateral estoppel (the tenth affirmative defense) are dismissed.

Department staff's motion for clarification or to strike affirmative defenses is otherwise denied.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 30, 2010
Albany, New York