STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law ("ECL"), Article 12 of the Navigation Law, and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ANTHONY TRUISI and MARIE TRUISI,

Respondents.

RULING ON MOTION TO STRIKE OR CLARIFY AFFIRMATIVE DEFENSES

DEC Case No. R2-20060530-230

Appearances of Counsel:

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

-- Sive, Paget & Riesel, P.C. (Daniel Riesel of counsel), for respondents Anthony Truisi and Marie Truisi

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO STRIKE OR CLARIFY AFFIRMATIVE DEFENSES

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Anthony and Marie Truisi alleging violations of the statutes and regulations governing the storage and discharge of petroleum at a gasoline service station located on Avenue U, Brooklyn, New York. Department staff moves for an order striking, or directing clarification of, affirmative defenses pleaded in respondents' answer. For the reasons that follow, Department staff's motion is granted in part, and otherwise denied.

PROCEEDINGS

In its December 4, 2008, complaint, Department staff alleged the following. Respondents Anthony and Marie Truisi purchased property located at 2961-2975 Avenue U, Brooklyn, in March 1987. Respondents owned and operated a gasoline service station at the site under the corporate name Diamond T Servicenter Inc., which according to the records of the Department of State is an inactive corporation. According to the records of the Department, respondent Anthony Truisi was the registered owner of the petroleum bulk storage facility at the site.

In April 1988, respondents sold the site. Respondents allegedly failed to inform the Department that the facility ceased operations, and failed to properly close the facility. In April 1994, a total of 12 abandoned underground storage tanks ("USTs") were discovered at the site. The then-current owner of the site re-registered the facility and properly closed and removed the tanks. During tank removal, a petroleum spill was discovered contaminating soil and groundwater at the site.

In December 2008, Department staff commenced this administrative enforcement proceeding against respondent by service of a notice of hearing and complaint. In the complaint, Department staff charged three causes of action alleging that:

(1) respondents failed to properly close the facility in violation of 6 NYCRR 613.9(b);

(2) respondents discharged petroleum into the waters of the State, without a permit and in contravention of water quality standards, in violation of ECL 17-0501, ECL 17-0807, and Navigation Law § 173; and

(3) respondents failed to immediately undertake containment of the petroleum discharge, in violation of Navigation Law § 176 and 17 NYCRR 32.5.

For the violations charged, Department staff seeks a civil penalty of no less than $116,850, and an order directing respondents to investigate and remediate the site to Department standards and consistent with a Department-approved work plan.

Respondents filed an answer dated January 26, 2009. In their answer, respondents asserted four defenses:

(1) the complaint fails to state a claim upon which relief can be granted;

(2) the Department's claims are barred by the doctrine of laches;

(3) no discharge of petroleum occurred while respondents owned or operated the site; and

(4) respondents were not required to permanently close any underground or aboveground storage tanks on the site because they intended to sell the site as an operating gas station.

By motion dated February 2, 2009, Department staff seeks an order pursuant to 6 NYCRR 622.4(f) and 622.6(c) striking, or directing clarification of, respondents' affirmative defenses. Respondents filed a memorandum dated February 9, 2009, opposing Department staff's motion.

DISCUSSION

Department staff's motion seeks alternative relief. Staff seeks clarification of the defenses pleaded in respondents' answer pursuant to 6 NYCRR 622.4(f). In the alternative, staff seeks dismissal of the defenses on the ground that they lack merit -- the administrative equivalent of a motion to dismiss defenses under CPLR 3211(b). The inquiry on motions addressed to the pleadings is directed to whether the pleader has a claim or defense, not whether the pleader has complied with technical pleading requirements. In addition, where a less drastic remedy than dismissal of a claim or defense is available to correct deficiencies in the pleadings, those remedies should be granted. Based upon these general principles, Department staff's motion to clarify defenses is considered first.

Motion to Clarify Affirmative Defenses

Section 622.4(c) provides that:

> "The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that

> respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense."

Section 622.4(f) further provides that:

> "The department staff may move for clarification of affirmative defenses within 10 days of completion of service of the answer 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."

The regulatory motion to clarify is both more limited and more broad than its analog under the CPLR -- the CPLR 3024(a) motion for a more definitive statement of a pleading. A section 622.4(f) motion is more limited because it only applies to affirmative defenses, not to the answer generally (compare CPLR 3024[a] [allowing for a more definite statement of a "pleading"]). On the other hand, it is more broad because it may be used even if no responsive pleading by Department staff is required (compare CPLR 3024[a] [motion for a more definite statement is available when a party is "required to frame a response"]; see also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3024:2).

Notwithstanding these differences, the purposes of the motions are similar. Both the section 622.4(f) motion and the CPLR 3024(a) motion are addressed to the sufficiency of the notice provided by the pleading. By its express terms, a motion pursuant to section 622.4(f) may be granted only when the affirmative defense is so vague or ambiguous that staff is not placed on "notice" of the nature of the defense.

When analyzing a motion to clarify defenses under section 622.4(f), several principles must be kept in mind. Because section 622.4(f) only authorizes clarification of affirmative defenses, the initial step in the inquiry is to determine whether a pleaded defense is, in fact, an affirmative defense. As is the case under the CPLR, Department staff, as the complainant, bears the burden of proof on all charges and matters they affirmatively assert in the complaint, while the respondent bears the burden of proof only on affirmative defenses (see 6 NYCRR 622.11[b][1], [2]; see also State Administrative Procedure Act [SAPA] § 306[1]). However, under

New York's liberal pleading rules, the mere fact that a respondent identifies what is actually a denial as an affirmative defense does not automatically shift the burden of proof from the complainant to the respondent. Where a complainant has the burden of proof on an allegation in its complaint, the burden remains with the complainant, and does not shift to the respondent merely because the respondent labeled the denial of that allegation as an affirmative defense (see Beece v Guardian Life Ins. Co., 110 AD2d 865, 867 [2d Dept 1985]; Matter of Greenman, ALJ Ruling, Oct. 22, 1997, at 3). Moreover, when in doubt as to whether a particular assertion is a denial or an affirmative defense, practitioners have long been advised to plead the assertion as a defense to avoid any possible waiver (see Riland v Frederick S. Todman & Co., 56 AD2d 350, 352 [1st Dept 1977]; Sinacore v State of New York, 176 Misc 2d 1, *4 [Ct Cl 1998]; Siegel, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 3018:16, at 157).

Thus, in ruling on a motion to clarify affirmative defenses, it must be determined whether the defense pleaded is actually an affirmative defense or is merely a denial labeled as a defense. If the defense is merely a denial labeled as a defense, clarification is not authorized under Part 622. On the other hand, if the defense is a true affirmative defense, the motion may be granted if the defense provides insufficient notice.

In making the determination whether a matter labeled as an affirmative defense is a true affirmative defense or merely a denial, Part 622 expressly provides that whenever the complaint alleges that a respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity charged shall constitute an affirmative defense (see 6 NYCRR 622.4[c]). This would include defenses based upon regulatory exemptions from permitting requirements (see 6 NYCRR 622.3[a][2]). Other affirmative defenses may be identified by analogy to the affirmative defenses specified in the CPLR (see CPLR 3018[b]). Failing that, affirmative defenses may be identified by applying the general standard for affirmative defenses provided in the CPLR -- matters which if not pleaded would likely take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading (see id.; Matter of Amerada Hess Corp., ALJ Ruling on Motion to Clarify Affirmative Defenses, Feb. 22, 2002, at 4).

With respect to the sufficiency of the notice provided by the affirmative defense, notice in the administrative context need only be reasonably specific, in light of all relevant circumstances, to apprise a party of the charge against it and to allow for the preparation of an adequate response (see Matter of Block v Ambach, 73 NY2d 323, 333 [1989]; Matter of Board of Educ. v Commissioner of Educ., 91 NY2d 133, 137 [1997]). Nothing in SAPA or the case law indicates that notice requirements for affirmative defenses asserted in an administrative answer are any more exacting than the requirements for administrative complaints or more exacting than the notice pleading requirements under the CPLR. Moreover, the drafters of Part 622's pleading requirements intended that they be the same as the notice pleading requirements of SAPA (see Part 622 and 624 Comments/Response Document, Dec. 1993, at 3).

Thus, where the affirmative defense is sufficiently specific to apprise Department staff of the nature of the defense and the activities or incidents upon which it is based and, thereby, provide staff with a fair opportunity to respond to the defense, sufficient notice has been provided (see Board of Educ., 91 NY2d at 140 [notice in the administrative context]; see also Foley v D'Agostino, 21 AD2d 60, 62-64 [1st Dept 1964] [discussion of New York's notice pleading requirements under the CPLR]). Only where an affirmative defense is so vague or ambiguous as to be unintelligible and without connection to any cognizable defense should the clarification motion be granted (see Della Villa v Constantino, 246 AD2d 867, 867 [3d Dept 1998] [CPLR 3024(a) motion]; see also Bower v Weisman, 639 F Supp 532, 538 [SD NY 1986] [standard under Federal Rules of Civil Procedure § 12(e)]).

In addition, where Department staff's motion does not challenge the sufficiency of the notice provided by the affirmative defense but, rather, seeks amplification of the defense, the motion to clarify should not be granted. Efforts to amplify pleadings and dispose of unmeritorious claims are more appropriately the function of discovery and motions for summary order, not motions for a more definite statement of a pleading (see Northway Eng'g, Inc. v Feliz Indus., Inc., 77 NY2d 332, 335-336 [1991]; see also Sanchez v New York City, 1992 US Dist LEXIS 9844, *2-3 [ED NY 1992]).

Thus, where an affirmative defense merely lacks "detail" concerning the facts or legal theory upon which an affirmative defense is based, but notice of the defense is otherwise provided, the motion to clarify should be denied, and

staff should be directed to employ available discovery devices to obtain the detail[1] (see Seigel, New York Practice § 230, at 380 [4th ed]; see also, e.g., B-H Transp. Co. v Great Atlantic and Pacific Tea Co., 44 FRD 436, 439 n 2 [ND NY 1968];). Only where the defense is so unintelligible that staff would be prejudiced in its efforts to conduct discovery should a motion to clarify be entertained (see Della Villa, 246 AD2d at 867; see also Bower v Weisman, 639 F Supp at 538 [SD NY 1986]).[2]

With these principles in mind, I turn to the specific defenses pleaded in respondents' answer.

1. First Defense

For their first defense, respondents state, "The Complaint fails to state a claim upon which relief can be granted" (Answer at 5). In their motion, Department staff recognizes that the failure to state a claim is not properly pleaded as an affirmative defense (see, e.g., Matter of Gramercy Wrecking and Envtl. Contrs., Inc., ALJ Ruling, Jan. 14, 2008, at 3-4). As respondents correctly point out, the defense, which is more properly a ground for a motion to dismiss the complaint, merely places the complainant on notice that the pleader may move for dismissal at some future point (see Riland, 56 AD2d at 352).

Because the failure to state a claim is not an affirmative defense, a motion to clarify it does not lie under section 622.4(f). In any event, staff's papers reveal that it

[1] Where an affirmative defense lacks any factual allegations, however, the defense may be subject to attack on a motion to dismiss, as will be discussed below.

[2] Under the CPLR, the discovery device used to amplify pleadings, limit the proof, and prevent surprise at trial is the bill of particulars (see Northway Eng'g, Inc. v Feliz Indus., Inc., 77 NY2d 332, 335-336 [1991]; Graves v County of Albany, 278 AD2d 578, 578 [3d Dept 2000]). As is the case under the Federal Rules of Civil Procedure, however, Part 622 abolishes bills of particulars (see 6 NYCRR 622.7[b][3] [prohibiting bills of particulars]). Presumably, the drafters of Part 622 abolished the bill of particulars for reasons similar to those motivating the drafters of the federal rules -- broad disclosure provisions render the bill largely superfluous (see Northway Engineering, 77 NY2d at 335-336; see also Swierkiewicz v Sorema N.A., 534 US 506, 512-513 [2002]). Due to the availability of other discovery devices under Part 622, the unavailability of the bill does not warrant expanding the motion for clarification to encompass amplification of pleadings. To do so runs afoul of Part 622's prohibition against bills of particulars in favor of discovery and motions addressed to the merits. To the extent prior ALJ rulings might be read as so expanding the motion for clarification, I decline to follow them (see e.g. Matter of Amerada Hess Corp., ALJ Ruling on Motion to Clarify Affirmative Defenses, Feb. 22, 2002).

is on notice of the nature of the assertion. Accordingly, the motion to clarify the first defense is denied.

2. Second Defense

For their second defense, respondents assert, "NYSDEC's claims are barred by the doctrine of laches" (Answer at 5). Department staff argues that laches is not available as a defense against the Department and, even if the defense were available to respondents, they failed to plead the defense with any detail or particularity.

Staff is correct that the common law doctrine of laches is not available against a State agency acting in a governmental capacity (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 177 n 2 [1985], cert denied 476 US 1115 [1986]). Nevertheless, we have recognized that a laches defense pleaded in an administrative answer places Department staff on notice that the respondent intends to raise an administrative delay defense based upon Cortlandt -- i.e., that the Department failed to conduct adjudicatory proceedings within a "reasonable time" under SAPA (see id.; see e.g. Matter of Gramercy Wrecking, at 5). Moreover, no ambiguity exists concerning the factual occurrence upon which respondents' base this defense. The complaint dated December 4, 2008, charges violations based on alleged activities of respondents occurring as long ago as 1988.

Thus, the affirmative defense is sufficiently specific to place the Department on notice that respondents intend to raise a Cortlandt defense. Accordingly, the motion to clarify the second defense is denied. Department staff's assertion that respondents failed to plead facts sufficient to support the defense is addressed below on staff's motion to dismiss.

3. Third Defense

The third defense asserted by respondents is that "No discharge of petroleum occurred while respondents owned and/or operated the Site" (Answer at 5). Department staff argues that the defense fails to provide notice of any facts or legal theory on which it is based. Respondents argue that the third defense simply refutes staff's allegation that respondents discharged petroleum into the waters of the State, an element of staff's prima facie case.

On its face, this "defense" is not an affirmative defense, but a denial labeled as a defense. In its complaint,

Department staff charges respondents for the illegal discharge of petroleum at the site (second cause of action), and for failing to immediately undertake containment of a petroleum discharge (third cause of action). Respondents are correct that Department staff has the burden of proving that respondents discharged petroleum into the waters of the State for each of violations charged (see ECL 17-0501; ECL 17-0807; Navigation Law §§ 173, 176). The defense merely denies that petroleum was discharged at the site during the period of respondents' ownership or operation of the site. The circumstance that respondents labeled this denial as a defense does not have the effect of shifting the burden of proof from staff to respondents and, thereby, convert the denial into an affirmative defense.

Because the third defense is not an affirmative defense, clarification is not authorized under section 622.4(f). Accordingly, the motion to clarify the third defense is denied.

4. Fourth Defense

In their fourth defense, respondents allege, "Respondents were not required to permanently close any underground or aboveground storage tanks on the Site because they intended to sell the Site as an operating gas station" (Answer at 5). Staff argues this defense is vague and ambiguous and fails to provide notice of the facts or legal theory on which it is based. Respondents, in opposition, argue that when they sold the facility, they intended to sell an operating gasoline station. They contend that they never took the tanks out of service and, therefore, were never under an obligation to permanently close the tanks pursuant to 6 NYCRR 613.9(b). Respondents assert that this defense merely challenges whether staff can establish a prima facie case for a violation of section 613.9(b).

Similar to the third defense, the fourth defense is a denial labeled as a defense. In order to establish the violation of 6 NYCRR 613.9(b) charged in the first cause of action, Department staff has the burden of showing that the gas station was permanently closed by respondent. Respondents' defense constitutes a denial that they closed the gasoline station when they sold it, and does not become an affirmative defense simply because they labeled it a defense.

Accordingly, the fourth defense is not an affirmative defense and clarification is not authorized under section 622.4(f). The motion to clarify the fourth defense is denied.

Motion to Strike Affirmative Defenses

In the alternative to their motion for clarification, Department staff seeks a ruling striking respondents' defenses. The gravamen of staff's motion is that respondents' defenses lack merit. Accordingly, the motion is in the nature of a motion to dismiss a defense (see CPLR 3211[b]), not a motion to strike (see CPLR 3024[b]).

In contrast to motions to clarify, which address only the sufficiency of the notice provided by the defense, motions to dismiss are addressed to the substance of the defense (see Foley, 21 AD2d at 64-65). Motions to dismiss affirmative defenses are analyzed applying the standards governing motions to dismiss defenses under CPLR 3211(b) (see Matter of ExxonMobil Oil Corp., ALJ Ruling, Sept. 13, 2002, at 2-3). Motions to dismiss may either challenge the pleading facially -- i.e., on the ground that it fails to state a claim or defense -- or may seek to establish, with supporting evidentiary material, that a claim or defense lacks merit as a matter of law (see Town of Hempstead v Lizza Indus., Inc., 293 AD2d 739, 740 [2d Dept 2002]; see also Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.41). On this motion, Department staff has not submitted any evidentiary material challenging the factual basis for respondents' defenses and, thus, has not carried its burden on this motion of establishing that any affirmative defenses are without merit (see Santilli v Allstate Ins. Co., 19 AD3d 1031, 1032 [4th Dept 2005]; Becker v Elm Air Conditioning Corp., 143 AD2d 965, 966 [2d Dept 1988]). Accordingly, only Department staff's facial challenge is considered.

On a motion challenging a pleading on the ground that it fails to state a claim or defense, the pleading is liberally construed (see 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, ALJ Ruling 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 Leon, 84 NY2d at 87-88; Foley v D'Agostino, 21 AD2d 60, 64-65 [1st Dept 1964]). If there is any doubt as to the availability of a defense, it should not be dismissed (see Butler, 58 AD3d at 148).

Pure legal conclusions, however, are not presumed to be true (see Bentivegna v Meenan Oil Co., 126 AD2d 506, 508 [2d

Dept 1987]). Thus, defenses that merely plead conclusions of law without supporting facts are insufficient to state a defense (see id.; 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]).

Finally, motions to dismiss may not be used to strike denials (see Rochester v Chiarella, 65 NY2d 92, 101 [1985]). If staff seeks to challenge denials prior to hearing, they must use a motion for order without hearing (see 6 NYCRR 622.12).

Applying these principles, I conclude that respondents' second defense must be dismissed. As previously noted, a laches defenses based upon Cortlandt has been recognized in proceedings under Part 622 (see, e.g., Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11; Matter of Manor Maintenance Corp., Order of the Commissioner, Feb. 12, 1996). To plead a Cortlandt defense, respondent must plead substantial actual prejudice resulting from the Department's delay in commencing the enforcement proceeding (see Cortlandt, 66 NY2d at 177-178; Matter of Giambrone, at 11).

In this case, respondents' answer simply asserts that "NYSDEC's claims are barred by the doctrine of laches" (Answer, at 5). Although an over 14-year delay -- from about May 1994, when the oil spill was allegedly discovered at the site, to December 2008, when the complaint was served -- is apparent from the pleadings, mere delay is not enough to state a Cortlandt defense (see Matter of Giambrone, at 11). The defense is deficient if it fails to include allegations showing not only delay, but also injury to respondents' private interests, and significant and irreparable prejudice to respondents' defense of the proceeding, resulting from the delay (see Cortlandt, at 177-178, 180-181; Matter of Giambrone, at 11-13). Respondents' answer contains no factual allegations supporting substantial actual prejudice resulting from the delay. Thus, because the defense merely pleads conclusions of law without supporting facts, it is insufficient (see Glenesk, 36 AD2d at 853).

Although I conclude the second defense must be dismissed, I nevertheless grant respondents leave to replead the defense. The exercise on a motion to dismiss is to determine whether respondents have a viable defense, not whether the defense is artfully pleaded (see Guggenheimer v Ginzburg, 43

NY2d 268, 275 [1977]). Here, respondents' memorandum of law indicates that the costs of remediation may have increased in the intervening years, and evidence may have been lost. The memorandum is not evidentiary and, therefore, is insufficient to remedy the lack of factual assertions in the answer (see Leon, 84 NY2d at 88). However, it suggests that facts may be available to support the defense. Thus, respondents should be allowed to replead if they wish to pursue the defense further.

With respect to respondents' first defense, Department staff argues that the failure to state a claim defense is a nullity and mere surplusage and, therefore, should be dismissed. In support of its request for dismissal, staff cites the ALJ's ruling in Matter of Gramercy Wrecking.

In Matter of Gramercy Wrecking, the ALJ held that where staff moves to dismiss the defense of failure to state a claim, it should be granted (see ALJ Ruling, Jan. 14, 2008, at 3-4). In so ruling, the ALJ relied upon the then-existing rule in the Appellate Division, Second Department (see id. at 4 n 3 [citing Bentivegna, 126 AD2d at 508]). The Second Department has since abandoned that rule and joined the remaining Departments, holding that the motion to dismiss the defense amounts to an attempt by the plaintiff to test the sufficiency of his or her own claims (see Butler v Catinella, 58 AD3d at 150). Accordingly, all four Departments now deny motions to dismiss the defense (see id. [stating the rule in the First, Second, and Third Departments]; Salerno v Leica, Inc., 258 AD2d 896 [4th Dept 1999]).

I agree with the Appellate Division that motions to dismiss the defense of failure to state a cause of action constitute an attempt by Department staff to test the sufficiency of its own pleadings (see id.; Riland, 56 AD2d at 352-353). I also agree that entertaining such motions encourages unnecessary motion practice (see Riland, at 353). Accordingly, I follow the Appellate Division rule and deny staff's motion to dismiss the first defense (see Matter of Adinolfi, ALJ Ruling, March 15, 2005, at 2-3). Department staff may safely ignore the defense unless and until respondents affirmatively move to dismiss the complaint for failure to state a cause of action.

Finally, with respect to respondents' third and fourth defenses, I have previously concluded that those defenses are merely denials labeled as defenses. Because motions to dismiss may not be used to strike denials (see Rochester v Chiarella, 65

NY2d at 101), staff's motion to dismiss these two defenses is denied.

RULING

Department staff's motion, insofar as it seeks clarification of respondents' defenses, is denied.

Department staff's motion, insofar as it seeks dismissal of respondents' defenses, is granted in part, and the second defense is dismissed with leave to replead. The motion to dismiss is otherwise denied.

Respondents may replead the second defense within twenty days after this ruling is received by respondents.

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

Dated: April 1, 2010
Albany, New York