

ILLINOIS POLLUTION CONTROL BOARD
April 7, 2016

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 16-61
) (Enforcement-Air)
AMSTED RAIL COMPANY, INC.,)
)
 Respondent.)

ORDER OF THE BOARD (By J.A. Burke):

The People of the State of Illinois allege air emission violations against Amsted Rail Company at its steel foundry in Granite City, Madison County. The People bring this enforcement case pursuant to Section 31 of the Illinois Environmental Protection Act (Act). 415 ILCS 5/31 (2014). The People seek to strike five affirmative defenses asserted by Amsted. The Board strikes Amsted’s third and fourth affirmative defenses because the defenses deny or attack the sufficiency of the complaint and do not assert affirmative matter. The Board also strikes Amsted’s fifth affirmative defense because it is a reservation of rights and not an affirmative defense. The Board denies the People’s motion as to the first and second affirmative defenses because these defenses relating to statutes of limitation are pled adequately.

PROCEDURAL BACKGROUND

The People’s thirteen count complaint against Amsted alleges air emission and permit violations at Amsted’s steel foundry. Amsted answered seven counts (counts VI through XIII) of the complaint and asserted five affirmative defenses (Ans.). The People moved to strike the affirmative defenses (Mot.), and Amsted responded (Resp.). The People seek leave to file a reply and provide a copy of that reply (Reply). The Board grants the People’s motion for leave to reply and considers the People’s reply in its analysis below.

As to the remaining six counts, the Board previously denied Amsted’s motion to dismiss these counts and ordered Amsted to answer these counts by May 2, 2016.

DISCUSSION

Amsted asserts five affirmative defenses. An affirmative defense asserts new matter to defeat a claim. *See Worner Agency v. Doyle*, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984). An affirmative defense defeats a claim even if all allegations in the complaint are true. *See People v. Community Landfill Company, Inc.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). An argument that attacks the sufficiency of a claim is not an affirmative defense. *Worner*, 121 Ill. App. 3d at 222.

The Board's procedural rules require that facts constituting an affirmative defense must be stated in the answer. 35 Ill. Adm. Code 103.204(d). The affirmative defense must be pled with the same specificity necessary for establishing a cause of action. International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proved. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557 (2d Dist. 1993).

The People object to Amsted's five affirmative defenses and move to strike the defenses. The Board denies the People's motion as to the first and second affirmative defenses. The Board grants the People's motion as to the third, fourth, and fifth affirmative defenses and strikes these defenses. The Board addresses each affirmative defense below.

First Affirmative Defense **Illinois Statute of Limitation**

Amsted asserts that five counts (counts VII, VIII, X, XI, and XII) are barred by a five-year statute of limitation. Ans. at 62. Specifically, Amsted argues that these counts are barred by the five-year deadline for "civil actions not otherwise provided for" in Section 13-205 of the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2014)). *Id.* The complaint, filed on November 16, 2015, contains alleged violations occurring before November 16, 2010. Ans. at 63. To the extent that violations occurred before November 16, 2010, Amsted contends that these counts are time-barred. *Id.* Amsted argues that the defense is pled sufficiently and properly asserted as an affirmative defense. Resp. at 3.

In deciding this motion, the Board takes as true the facts of the defense and construes them in favor of Amsted. *See Raprager v. Allstate Insurance Co.*, 183 Ill. App. 3d 847, 854 (2nd Dist. 1989) (an affirmative defense should not be stricken where the well-pled facts of an affirmative defense raise the possibility that the defense will prevail). Amsted's first affirmative defense admits the legal sufficiency of these counts in the complaint and relies on facts asserted in the complaint to plead the defense. For example, Amsted cites to the People's alleged violations occurring before November 16, 2010. Ans. at 63. The Board agrees that a statute of limitation is a proper affirmative defense in that it asserts new matter to defeat the People's claims.

The People argue that the Board should strike the defense because the five-year time bar does not apply to enforcement actions brought by the People under Section 31 of the Act. Mot. at 3. In other words, Amsted cannot prevail on this defense. Reply at 2. However, a motion to strike an affirmative defense raises only the question of whether the defense is sufficiently pled. Raprager, 183 Ill. App. 3d at 854. Similarly, the Board previously held that a motion to strike an affirmative defense attacks only the legal sufficiency of the facts. Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.A.A., Inc. and Texaco, Inc., PCB 09-066, slip op. at 21 (March 18, 2010). For the reasons stated above, the Board finds that the first affirmative defense meets the pleading requirements and denies the People's motion as to this

defense. The Board notes that this holding does not consider whether Amsted ultimately will prevail on this defense.

Second Affirmative Defense
Federal Statute of Limitation

Counts XI and XII allege violations of Amsted's Clean Air Act Permit Program (CAAPP) permit. Amsted contends that the CAAPP program is a federal Clean Air Act program, and that Clean Air Act violations are subject to a federal five-year statute of limitation. Ans. at 64, citing 26 U.S.C. § 2462. According to Amsted, enforcement of any violation occurring before November 16, 2010 is barred. *Id.*

The People repeat that no statute of limitation applies to enforcement cases brought by the People under Section 31 of the Act. Mot. at 5. Further, the People are not time barred by a federal statute of limitation when enforcing violations of a CAAPP permit. *Id.* Amsted states that federal courts routinely apply the federal five-year limitation to enforcement actions brought under the Clean Air Act. According to Amsted, the People's claims seeking to enforce the Clean Air Act must also be subject to this five-year limitation because holding otherwise would permit the State to do what the federal government cannot do, *i.e.*, bring enforcement actions more than five years after the cause of action accrues. Resp. at 5, 6.

Similar to the first affirmative defense above, the Board finds that the second affirmative defense meets the pleading requirements and denies the People's motion as to this defense. Again, the Board notes that this holding does not consider whether Amsted ultimately will prevail on this defense, only that the pleading requirements have been met.

Third Affirmative Defense
Error in Permit Terms

Count X alleges Amsted exceeded permit emission limits for particulate matter. Amsted contends that these emission limits are erroneous. Ans. at 65. For example, particulate emission limits for Amsted's molding sand system #6 are 0.5 tons per month, and 0.5 tons per year. *Id.* Amsted argues that this monthly limit does not correlate to the annual limit and may be a typographical error. *Id.*

The People argue Section 40 of the Act provides Amsted with a procedure for challenging permit terms, and that it is not an affirmative defense for Amsted to refuse compliance with those terms. Mot. at 8. In other words, it is not an affirmative defense to argue that a permit contains errors. Reply at 3. Amsted argues that its defense should not be stricken because whether the defense will prevail is not the issue, and the well-pled facts raise the possibility that Amsted will prevail. Resp. at 6-7.

A permit applicant may appeal an Illinois Environmental Protection Agency permit to the Board within 35 days after receiving the permit. 415 ILCS 5/40 (2014); 35 Ill. Adm. Code 105.302(e). Asking the Board to find that terms in the permit are erroneous asks the Board to review the permit beyond the 35-day appeal period. Allowing Amsted to now challenge the

permit renders the 35-day appeal period meaningless. *See People v. Panhandle Eastern Pipeline Company*, PCB 99-191, slip op. at 16 (Nov. 15, 2001). The Board cannot do so. Therefore, the Board grants the People's motion to strike Amsted's third affirmative defense.

Fourth Affirmative Defense
Incorrect Opacity Testing Method

Count XIII alleges that Amsted did not conduct required opacity testing. Amsted states it has been conducting opacity testing. Ans. at 66. Amsted contends the Agency demands that Amsted use an improper test method. *Id.*

The People contend that Amsted's argument is a denial of the violations and not a valid affirmative defense. Mot. at 9. Amsted argues that its defense is not merely a denial, but raises affirmative matter (improper testing method) and asserts new matter (correct testing method). Resp. at 7. The People respond that Amsted's assertion that it is conducting the required opacity testing is a legal conclusion without sufficient factual support. Reply at 4.

In deciding whether to strike this defense, the Board first takes note of the People's allegation that Amsted is not conducting required opacity testing. The Board then takes as true Amsted's contention that it is performing the required opacity testing. Amsted's contention expressly denies the People's allegation and is not an affirmative defense. The Board therefore grants the People's motion to strike Amsted's fourth affirmative defense.

Fifth Affirmative Defense
Reservation of Rights

As a fifth affirmative defense, Amsted reserves the right to assert additional affirmative defenses later. Ans. at 66. The People object that such a reservation of rights is not a valid affirmative defense. Mot. at 9. Amsted offers to withdraw this affirmative defense if the People agree that reserving the right is unnecessary. Resp. at 8. However, the People declined to do so. Reply at 5.

This asserted defense is a reservation of rights and not an affirmative defense. *See People v. Professional Swine Management, et al.*, PCB 10-84, slip op. at 17 (Nov. 7, 2013). The Board therefore strikes Amsted's fifth affirmative defense. Board rules allow Amsted to later raise additional affirmative defenses that could not have been known before hearing. 35 Ill. Adm. Code 103.204(d).

CONCLUSION

The Board grants the People's motion to strike affirmative defenses three, four and five. The Board denies the motion as to the first and second affirmative defenses. As previously held by the Board, Amsted is required to file its answer to counts I through VI of the People's complaint by May 2, 2016. *See People v. Amsted Rail Company, Inc.*, PCB 06-61, slip op. at 4 (March 3, 2016).

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 2016, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Clerk
Illinois Pollution Control Board