

the affirmative defenses (Aff. Def.) on May 8, 2017 and the People filed a motion to strike (Mot.) on June 7, 2017. Magna Tax and the People then filed a response and a reply, respectively, on June 22, 2017 and July 5, 2017. The next day, July 6, 2017, Magna Tax filed additional affirmative defenses, which were withdrawn on September 6, 2017. This order only considers the affirmative defenses filed in amended form on May 8, 2017 and the motion to strike filed on June 7, 2017.

Factual Background

A former owner of the factory in Mattoon, Coles County began remediating contamination at the property in 1998. Magna Tax later acquired the property. Remediation ended in 2008 and Magna Tax received an NFR letter from the Agency, under the Site Remediation Program, stating that the factory no longer threatened the environment. Aff. Def. at 1-2.

On October 5, 2011, the Agency inspected the property and then took a soil sample on November 15, 2011. The Agency issued Magna Tax a violation notice for the factory on May 2, 2012. Magna Tax investigated the site on August 23, 2012 and September 5, 2012. The Agency took another soil sample on September 5, 2012. Magna Tax again investigated the site on September 13, 2013. It then reported a release from a UST to the Illinois Emergency Management Agency. Several days later, on September 17, 2013, Magna Tax registered the UST with the Office of the Illinois State Fire Marshal (OSFM). Magna Tax removed the UST on October 16 and 17, 2013. On October 31, 2013, Magna Tax submitted a UST Fund eligibility and deductible application which noted that the UST's piping had leaked. Ans. at ¶¶ 6-16.

The People allege that the area near the UST contained and continues to contain contaminants. Magna Tax denies these allegations. Ans. at ¶¶ 8, 12. As explained below, an affirmative defense admits all well-pled facts of a complaint. For deciding a motion to strike affirmative defenses, the Board accepts the complaint's factual allegations as true.

During its 2011 inspection, the Agency observed a dark stain on a concrete pad and dark liquid on the surface of the adjacent soil. When the Agency took the soil sample on November 15, 2011, dark liquid emerged from the sampling hole. Additionally, the Agency found a UST one foot below the soil's surface. The Agency's analysis detected concentrations of semi-volatile compounds, volatile organic compounds, and metals in the soil sample. Analysis following the September 5, 2012 sampling detected concentrations of metals. During Magna Tax's investigative digs and UST removal, soil saturated with a dark liquid below groundwater level was observed. Compl. at ¶¶ 6-11.

Legal Background

Alleged Violations

The People allege that Magna Tax violated water and land pollution provisions of the Act and waste disposal provisions of Board regulations relating to the contaminants released from the factory site's UST. Specifically, the People allege that Magna Tax violated Sections 12(a),

12(d), 21(a), 21(d)(2), and 21(e) of the Act and Sections 722.111 and 812.101(a) of the Board's waste disposal regulations by:

Count I: Causing or allowing dark liquid to be consolidated at the site and causing or allowing a UST to discharge, deposit, spill, or leak waste material into the environment, violating 415 ILCS 5/21(a), (e) (2016);

Count II: Failing to determine whether the waste released from the UST was a hazardous waste or special waste, violating 415 ILCS 5/21(d)(2) (2016) and 35 Ill. Adm. Code 722.111;

Count III: Failing to apply for and maintain a waste disposal permit for the site, violating 415 ILCS 5/21(d)(1), (d)(2) (2016) and 35 Ill. Adm. Code 812.101(a);

Count IV: Causing, threatening, or allowing the discharge of contaminants in close proximity to groundwater, violating 415 ILCS 5/12(a) (2016); and

Count V: Depositing contaminants on the site in such place and manner so as to create a water pollution hazard, violating 415 ILCS 5/12(d) (2016).

The People ask that Magna Tax pay civil penalties, cease and desist from further violations, and undertake action necessary to correct its violations of Sections 12(a) and 12(d) of the Act, *i.e.*, remediate the site.

Affirmative Defenses

An affirmative defense admits the legal sufficiency of the complainant's cause of action, and then asserts a new matter by which the apparent right is defeated. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984); Farmers Auto Ins. Ass'n v. Neumann, 2015 IL App. (3d) 140026, ¶ 16. A successful affirmative defense admits all well-pled facts of the complaint, but still defeats the claim. People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

An argument that attacks a claim's sufficiency is not an affirmative defense. Worner, 121 Ill. App. 3d at 222. Legal conclusions filed as affirmative defenses, but unsupported by allegations of specific facts, are insufficient. People v. Hicks Oils & Hicksgas, Inc., an Indiana Corp., PCB 10-12, slip op. at 6 (Dec. 17, 2009), citing LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557 (2nd Dist. 1993). Rather, "a pleading must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled." *Id.*, quoting Richco Plastic Co v. IMS Co., 288 Ill. App. 3d 782, 784-85 (1st Dist. 1997).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, attacking only the legal sufficiency of the pleading. Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854 (2nd Dist. 1989). Where an affirmative defense's well-pled facts raise the possibility that the party asserting them will prevail, the defense should not be stricken. *Id.*

**MAGNA TAX’S CLAIMED AFFIRMATIVE DEFENSES
ARE NOT VALID AFFIRMATIVE DEFENSES**

Applying the standards articulated above, the Board finds that neither of Magna Tax’s claimed affirmative defenses are valid affirmative defenses. As explained below, the first claimed affirmative defense—concerning proportionate share liability—applies only to remedies after a violation has been shown; the second claimed affirmative defense—concerning the NFR letter—denies facts alleged in the complaint. Therefore, neither is a valid affirmative defense.

Proportionate Share Liability

In the complaint, the People request that the Board require Magna Tax to cease and desist from further violations and remove and dispose contamination from the factory. As an affirmative defense, Magna Tax claims that Section 58.9 of the Act—addressing proportionate share liability—precludes requiring the company to remediate. Magna Tax cites two provisions of Section 58.9. The first provision states that no person may be required “to conduct remedial action . . . beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person’s act or omission” 415 ILCS 5/58.9(a)(1) (2016). The second states that “a person who neither caused nor contributed to in any material respect a release of regulated substance on, in, or under the site that was identified and addressed by the remedial action taken pursuant to this Title” may not be required to remediate. 415 ILCS 5/58.9(a)(2).

Magna Tax alleges that it “was not and is not the proximate cause of these chemical constituents being located at or on the Site.” Aff. Def. at 3. According to Magna Tax, because Section 58.9 protects parties that have not proximately caused the release of regulated substances, the People cannot require Magna Tax to remediate. *Id.*

However, proportionate share liability limits available *remedies* after a violation has already been shown. See Proportionate Share Liability: 35 Ill. Adm. Code 741, R97-16, slip op. at 4 (Dec. 17, 1998); Cole Taylor Bank v. Rowe Industries, PCB 01-173, slip op. at 4 (June 6, 2002). Here, the Board has not yet found any violation. As Magna Tax’s claim of proportionate share liability is not a valid affirmative defense, the Board strikes it. The Board makes no finding on whether proportionate share liability applies to this case.

NFR Letter

Magna Tax’s second claimed affirmative defense attacks only count IV (water pollution) and count V (water pollution hazard). Aff. Def. at 3. These counts allege that contaminants from the UST pose an environmental risk. For instance, the People allege that liquid from the UST, released close to groundwater, “is likely to create a nuisance or render groundwater harmful or detrimental or injurious to public health” Compl. at ¶ 36.

The second asserted defense relies on Section 58.10(a) of the Act, which states that an Agency-issued NFR letter under the Site Remediation Program “shall be considered prima facie evidence that the site does not constitute a threat to human health and the environment” 35

ILCS 5/58.10(a) (2016). An affirmative defense must admit all well-pled factual allegations of the complaint. Magna Tax argues, however, that the NFR letter is *evidence* undermining the complaint's allegations of environmental risk. Magna Tax therefore does not admit the People's claim but rather attacks it. As Magna Tax's second asserted defense is not a valid affirmative defense, the Board strikes it. The Board makes no finding on the NFR letter's relevance, if any, to this case.

CONCLUSION

The Board grants the People's motion and strikes Magna Tax's two claimed affirmative defenses.

IT IS SO ORDERED.

I, Don A Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 19, 2017, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, looped initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board