

ILLINOIS POLLUTION CONTROL BOARD
May 1, 1997

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-133
)	(Enforcement - EPCRA)
DOUGLAS FURNITURE OF)	
CALIFORNIA, INC.,)	
a California Corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a March 27, 1997 motion to strike respondent's affirmative defenses (Motion) in which complainant objects to all five affirmative defenses raised in the respondent's March 13, 1997 answer to the complaint (Answer). Pursuant to Section 103.140(c) of the Board's procedural rules, if a party does not file a response, the party "shall be deemed to have waived objection to the granting of the motion, but such waiver of objection does not bind the Board" in its decision. (35 Ill. Adm. Code 103.140(c).) On April 28, 1997 Douglas Furniture filed a motion opposing complainant's motion to strike respondent's affirmative defenses. In reviewing the motion the Board concludes that this filing is more accurately termed a response to complainant's motion to strike affirmative defenses, rather than a motion. As such, Douglas Furniture was required to file its response within seven days of receipt of complainant's motion to strike affirmative defenses. (35 Ill. Adm. Code 103.140(c).) The Board finds that Douglas Furniture's response is not timely filed; therefore, the Board declines to accept this filing.

In general terms the affirmative defenses set forth in Douglas Furniture's answer concern the doctrine of unclean hands, waiver, promissory estoppel and the inappropriateness of the penalty and costs assessed in this matter. Complainant argues that pursuant to Section 5/2-613(d) of the Illinois Code of Civil Procedure (735 ILCS 5/2-613(d) (1994)), Douglas Furniture's affirmative defenses are legally insufficient for several reasons and requests the Board to strike all five defenses. For the reasons stated below, the Board grants complainant's motion to strike as to Douglas Furniture's first, second, fourth and fifth affirmative defenses.

As a preliminary matter the Board notes that Section 101.100 of the Board's procedural rules specifically states that the Code of Civil Procedure shall not expressly apply to proceedings before the Board; however, parties may argue the applicability absent a provision in the Board's procedural rules. (35 Ill. Adm. Code 101.100.) The Board's procedural rules

contain provisions regarding the filing of affirmative defenses. Specifically, Section 103.122(d) provides:

Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or supplemental answer filed pursuant to Section 103.210(b).

(35 Ill. Adm. Code 103.210(b).) Therefore, complainant's reliance on the Code of Civil Procedure is unnecessary in this matter.

STATEMENT OF FACTS

In its complaint, the State asserts that Douglas Furniture, a household furniture manufacturer, uses certain chemicals that require it to submit to the Agency toxic chemical release forms, also known as "Form R reports", on a yearly basis. (Complaint at 3.) Complaint further states that on September 6, 1995 it sent by certified mail a warning notice to Douglas Furniture for its failure to submit Form R reports for 1994. The warning notice provided a thirty-day time period by which Douglas Furniture must respond. Douglas Furniture did not submit its 1994 Form R report until August 6, 1996. (Complaint at 4.) Complainant states that daily penalties accrued over an 86-day period for Douglas Furniture's failure to submit these reports, resulting in a civil penalty of \$43,000 plus costs and attorney fees. (Complaint at 5.)

In its Answer, Douglas Furniture states that it hired Dr. Kenneth Fang of Global Environmental, a one-man environmental consulting firm, to assure compliance with all relevant regulations including the reporting requirements at issue. When it received the September 6, 1995 warning notice, Douglas Furniture attempted to contact Dr. Fang, who kept all of Douglas Furniture's environmental records, only to discover that Dr. Fang was out of the country for an indeterminate amount of time. (Answer at 1-2.)

Douglas Furniture states that it then contacted Carlita Crockett of the Agency who suggested that the United States Environmental Protection Agency (USEPA) be contacted to verify if the forms had been filed on the federal level. Douglas Furniture asserts that the Agency understood and was sympathetic to the problem. Douglas Furniture also asserts that it believed any enforcement action would be postponed until it failed to cooperate with the Agency, and that the Agency placed an extension of the thirty day time period by which Douglas Furniture was to respond to the warning notice. (Answer at 2-3.)

Douglas Furniture states that on May 15, 1996 it received a letter from the Agency which informed Douglas Furniture that it was liable for payment of a \$34,000 penalty for failure to submit the 1994 Form R reports. Douglas Furniture states that it contacted the Agency to explain its inability to locate the records through Dr. Fang or the USEPA, but that it was willing to recreate the 1994 Form R reports. Douglas Furniture asserts that John Waligore of the Agency "agreed to speak to his supervisor about abating Douglas Furniture's

fine and not seeking enforcement of the proposed penalty in light of Douglas Furniture's unfortunate circumstances and continued efforts to cooperate". (Answer at 4.) Douglas Furniture states that it recreated the missing records and submitted them to the Agency in early August 1996. Douglas Furniture states that "it took these time consuming and expensive extraordinary measures in good faith in order to comply with the [Agency's] requests, and with the belief that the [Agency] would not pursue the imposition of a penalty against Douglas Furniture." (Answer at 5.)

ARGUMENTS

First Affirmative Defense

In its first affirmative defense, Douglas Furniture argues that "[c]omplainant seeks unreasonably high and purely punitive penalties in this matter which are unrelated to the purposes of the Illinois Environmental Protection Act (Act) or regulations and, as a consequence, its claims are and should be barred by the doctrine of unclean hands". (Answer at 10.) Complainant argues that this affirmative defense should be denied because it is insufficiently pled and because it addresses the remedy, not the legal sufficiency of the Complaint. (Motion at 3-4.)

Second Affirmative Defense

Douglas Furniture argues in its second affirmative defense that it acted in good faith in correcting any non-compliance by recreating its records as requested by the Agency. Douglas Furniture asserts that the Agency failed to live up to the extension it granted or its promise to abate the penalty; therefore complainant's action should be barred by the doctrines of unclean hands and waiver. (Answer at 10.)

In its motion, complainant replies that Douglas Furniture failed to explain how the doctrine of waiver applies in this matter. Specifically complainant asserts that Douglas Furniture did not plead facts to support a claim that the State relinquished its rights to bring an action for Douglas Furniture's failure to file its toxic chemical report. Complainant states that Douglas Furniture erroneously interpreted an Agency employee's statement to "keep trying to get the information from the USEPA" as a grant of an extension to file the forms, and a relinquishment of the State's right to bring an enforcement action in this matter. Complainant argues that the Act gives neither the Agency's employees nor the Agency itself the authority to grant such an extension; therefore, no waiver of a right to bring an enforcement action occurred. Complainant urges the Board to strike Douglas Furniture's second affirmative defense as legally insufficient. (Motion at 4-6.)

Third Affirmative Defense

Douglas Furniture next argues that it responded promptly to all Agency correspondence, attempted to gain information from both the Agency and the USEPA concerning its belief that the forms had been timely filed, and worked closely with both agencies to recreate the necessary records "with the understanding that the Agency would work with Douglas Furniture to abate any

potential fine”. (Answer at 10.) Douglas Furniture concludes that complainant’s action should therefore be barred by the doctrine of promissory estoppel. (Answer at 10.)

Complainant responds that Douglas Furniture’s third affirmative defense addresses the issue of penalty and thus is not a defense at all. (Motion at 6.) In addition, complainant argues that the defense is insufficiently pled regarding an Agency employee’s affirmative statement that the State would abate the penalty and not seek enforcement, or that Douglas Furniture relied on the alleged statement to its detriment. Complainant argues that Douglas Furniture must prove that the affirmative acts which induced reliance were acts of the public body, not the unauthorized acts of a ministerial officer or ministerial misinterpretation. (Motion at 6-7; *citing to American Nat’l Bank and Trust v. Village of Arlington Hts.*, 115 Ill. App. 3d 342, 450 N.E.2d 898 (1st Dist. 1983).) Complainant asserts that there were no actions upon which Douglas Furniture could reasonably rely to estop the Agency from this enforcement action. Finally, complainant argues that the time and money Douglas Furniture spent in recreating its toxic chemical forms were not additional expenditures, but expenditures that would have been incurred in the course of compliance. (Motion at 6-9.)

Fourth Affirmative Defense

In its fourth affirmative defense Douglas Furniture argues that any penalty imposed against it is purely punitive in nature and would not serve the purposes of the Act. (Answer at 11.) Complainant responds that this argument speaks to the issue of the requested remedy, not the underlying cause of action, and should therefore be stricken. (Motion at 9.)

Fifth Affirmative Defense

Douglas Furniture asserts as its fifth and final affirmative defense that no costs of litigation should be assessed against it because of its good faith efforts to comply and the lack of any economic benefit gained by it. (Answer at 11.) Complainant replies that, again, this defense speaks to the issue of the requested remedy, not the underlying cause. Therefore, complainant argues that this affirmative defense should be stricken. (Motion at 9.)

DISCUSSION

Doctrine of Unclean Hands

The equitable doctrine of unclean hands provides that a party seeking equitable relief cannot take advantage of his own wrong. (*State Bank v. Sorenson*, 167 Ill. App. 3d 674, 521 N.E.2d 587 (1988).) The Board finds that Douglas Furniture failed to demonstrate how the State’s actions were inappropriate and how the State has taken advantage of its own wrong. Therefore, the Board strikes Douglas Furniture’s first affirmative defense and the first part of its second affirmative defense.

Waiver

As complainant correctly states, the doctrine of waiver applies when a party intentionally relinquishes a known right or conduct warrants an inference of such relinquishment. (Motion at 4-5 *citing to Hartford Accident and Indemnity Co. v. D.F. Bast, Inc.*, 56 Ill. App. 3d 960, 372 N.E.2d 829 (1st Dist. 1977).) However, the Board is not convinced that Douglas Furniture could infer from its contacts with the Agency that the Agency had relinquished its right to bring an enforcement action. Douglas Furniture failed to timely file its 1994 Form R report and the Agency can impose a penalty of \$100 per day for such failure, pursuant to Section 42b.5 of the Act. The Board finds nothing in the actions of the Agency's personnel that could lead Douglas Furniture to the conclusion that the Agency waived its option to impose a penalty in this matter. The Board strikes Douglas Furniture's second affirmative defense in its entirety.

Promissory Estoppel

Douglas Furniture claims that it promptly responded to the Agency's correspondence regarding the missing 1994 Form R report, and that it recreated its records "with the belief that the [Agency] was working with Douglas to resolve this matter through voluntary compliance and that it would not pursue the imposition of a penalty against Douglas Furniture." (Answer at 5.) Douglas Furniture asserts that complainant should be estopped from pursuing this enforcement action because of its good faith reliance.

The doctrine of promissory estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. (*Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996).) The party who asserts estoppel must prove the requisite elements of estoppel by clear, precise and unequivocal evidence. (*Central Transport, Inc. v. Village of Hillside*, 210 Ill. App. 3d 499, 568 N.E.2d 1359 (1st Dist. 1991).) However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." (*Gorgees v. Daley*, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993).)

A party seeking to estop the government must prove at least two elements: (1) an affirmative act on the part of the government entity, and (2) the inducement of substantial reliance by the affirmative act. (*Central Transport, Inc. v. Village of Hillside*, 210 Ill. App. 3d 499, 568 N.E.2d at 1368.) For purposes of estoppel, a party seeking to estop the government must show that the affirmative act was of the public body itself, rather than the unauthorized or mistaken act of a ministerial officer. (*American Nat'l Bank and Trust v. Village of Arlington Hts.*, 115 Ill. App. 3d at 347, 450 N.E.2d at 903.)

In order to prevail on its promissory estoppel claim, Douglas Furniture must show that it (1) reasonably and detrimentally relied on the Agency's words or conduct; and (2) that the words or conduct upon which it reasonably and detrimentally relied were those of the Agency, not those of an unauthorized or mistaken act of an Agency official. In particular, Douglas Furniture will have to prove that, but for the conduct of the Agency, it could have and would have filed its 1994 Form R within 30 days of receiving the Agency notice, and that the Agency, not one of its

officials, misrepresented its intention to seek enforcement if the Form R was not filed within 30 days.

The Board finds that Douglas Furniture's allegations, if broadly construed and accepted as true for the purposes of this motion, properly allege an affirmative defense of promissory estoppel. While Douglas Furniture has not alleged each of the facts necessary to prevail on this defense, it has alleged enough facts to preclude the Board from striking this affirmative defense without further discovery. The Board declines to strike Douglas Furniture's third affirmative defense.

Purely Punitive Penalty

The Board agrees with complainant that Douglas Furniture's fourth affirmative defense speaks to the issue of the penalty, not the cause of action; therefore the Board will strike it as an affirmative defense.

Reasonable Costs of Litigation

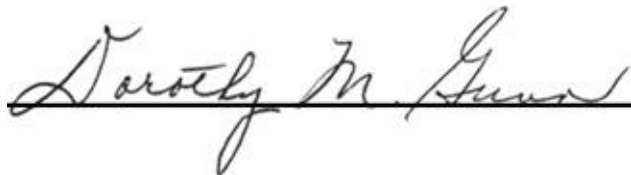
The Board finds that Douglas Furniture's fifth affirmative defense also addresses the penalty, not the legal sufficiency of the underlying cause of action; therefore the Board strikes this affirmative defense.

CONCLUSION

In sum, the Board grants complainant's motion to strike affirmative defenses as to Douglas Furniture's first, second, fourth and fifth affirmative defenses, and denies complainant's motion as to the third affirmative defense. This matter shall proceed to hearing. The Board notes that at hearing Douglas Furniture will have the opportunity to introduce matters regarding its third affirmative defense, including those raised in its motion opposing complainant's motion to strike respondent's affirmative defenses

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 1st day of May, 1997, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a solid horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board