

In an affirmative defense, the respondent alleges “new facts or arguments that, if true, will defeat ... [complainant’s] claim even if all allegations in the complaint are true.” People v. Community Landfill Co., PCB 97-193 (Aug. 6, 1998). The Code of Civil Procedure gives additional guidance on pleading affirmative defenses. Section 2-613(d) provides, in part:

The facts constituting any affirmative defense ... and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint, ... in whole or in part, and any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d)(2002).

The Board’s procedural rules state the need for a factual basis to assert an affirmative defense. (Section 103.204):

Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not be known before hearing.

A valid affirmative defense gives color to the opposing party’s claim but then asserts new matter which defeats an apparent right. Condon v. American Telephone and Telegraph Co., 210 Ill. App. 3d 701, 569 N.E.2d 518, 523 (2d Dist. 1991), citing The Worner Agency Inc. v. Doyle, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (4th Dist. 1984). A motion to strike an affirmative defense admits well-pleaded facts constituting the defense, and attacks only the legal sufficiency of the facts. “Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense shall not be stricken.” International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630-631, 609 N.E.2d 842, 853-54 (1st Dist. 1993), citing Rapraeger v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2d Dist 1989).

AFFIRMATIVE DEFENSES

On July 11, 2003, the respondents filed an answer to the complaint and affirmative defenses. On August 12, 2003, the People filed a motion to dismiss respondents’ affirmative defenses. The following gives the arguments of the respondents and the People, and the Board’s decision.

First Affirmative Defense

Respondents argue that the waste observed on December 2, 1999 and March 12, 2001, outside of the permitted area was general construction and demolition debris which was authorized for storage without a permit pursuant to Section 22.38 of the Act. Respondents, therefore, argue that it is in compliance with the Act pursuant to Section 22.38 of the Act. Ans. at 9-10.

The People argue that respondents' affirmative defense contains only a broad assertion without supporting facts. To come under Section 22.38 of the Act, the People argue there are a number of requirements which include: (1) the facility accept exclusively general construction or demolition debris; (2) within 48 hours of the receipt of the debris that they be stored; (3) that the debris be transported off-site within 72 hours; (4) that all the sources and transporters of the accepted materials are identified; (5) access to the facility is controlled; and (6) proper documentation and record keeping is provided to the Agency. The People argue that respondent did not allege that they complied with any of the requirements under Section 22.38. Complainant, therefore, argue respondents affirmative defense fails to specify facts or arguments required for pleading a claim or a defense, and should be dismissed. Mot. to Dismiss at 2-4.

The Board finds that respondents' pleadings provide an insufficient factual basis upon which it can rely to make an adequate determination of the validity of the affirmative defense. The respondent presents only a conclusion of law which fails to satisfy the Board's procedural requirements as set forth in Section 103. 204. 35 Ill. Adm. Code 103.204. Therefore, the Board requires a supplemental answer from the respondent outlining facts in support of the proposed affirmative defenses.

Second Affirmative Defense

Respondents' state that a pre-enforcement conference was held on September 15, 1999. At the conference, respondents state that they were advised by Cliff Gould and James Haennicke of the Agency that it was acceptable for respondents to store general construction and demolition debris in any unpermitted area of the site pursuant to Section 22.38 of the Act as long as proper notice was given to the Agency and proper procedures were followed. Respondents, therefore, argue that its actions were both in compliance with Section 22.38 of the Act and were undertaken in a manner specifically suggested and approved by the Agency. Ans. at 10

The People argue that the respondents did not allege they have taken any of the steps required by Section 22.38 and that this affirmative defense does not contain any new facts or arguments. The People argue that respondents merely allege they gained the knowledge of a section of the Code and through virtue of this knowledge, they are in compliance. The People, therefore, argue that this affirmative defense does not rise to the level of a new fact or argument and as a result it should be dismissed. Mot. to Dismiss at 4-5.

The respondents' pleading notes that they were following the advice of Agency representatives that construction debris can be stored at an unpermitted site pursuant to Section 22.38 of the Act. But they do not specify how they complied with the numerous requirements clearly annunciated in that Section. The Board requires a supplemental answer providing additional facts in support of the second affirmative defense.

CONCLUSION

The Board grants the People's motion to dismiss the respondents' affirmative defense at this time. It will allow the respondent 30 days from the date of this order, or until October 17,

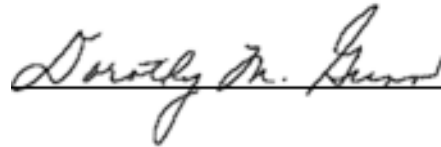
2003 to provide the Board with a supplemental answer outlining additional facts in support of each affirmative defense asserted.

IT IS SO ORDERED.

Chairman T.E. Johnson dissented.

Board Member G.T. Girard concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 18, 2003, by a vote of 4-1.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board