

ILLINOIS POLLUTION CONTROL BOARD
June 15, 2006

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 00-104
) (Enforcement – Water)
THE HIGHLANDS, L.L.C., and MURPHY)
FARMS INC. (a division of MURPHY)
BROWN, LLC, a North Carolina limited)
liability corporation),)
)
Respondents.)

ORDER OF THE BOARD (by N.J. Melas):

On June 7, 2005, Murphy Farms, Inc. (Murphy Farms) filed an answer and affirmative defenses in response to the complainant's second amended complaint. On July 5, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), moved to strike the alleged affirmative defenses. On October 20, 2005, the Board allowed Murphy Farms to withdraw the second alleged affirmative defense and granted the People's motion to strike Murphy Farms' third alleged affirmative defense. The Board did not rule on the alleged affirmative defense of *laches*, but rather allowed Murphy Farms to amend the pleadings regarding that affirmative defense. On October 31, 2005, Murphy Farms filed an amended affirmative defense based on *laches* as to all counts of the second amended complaint.

On April 26, 2006, the People moved to strike Murphy Farms' amended affirmative defense, claiming that *laches* may not be used as an affirmative defense in this matter. Murphy Farms responded on May 9, 2006. On May 26, the People filed a reply. As set forth in more detail below, the Board denies the People's motion to strike as untimely and directs the hearing officer to proceed expeditiously to hearing.

BACKGROUND

Count I of the People's second amended complaint alleges air and odor pollution in violation of Section 9(a) of the Environmental Protection Act (Act) and Section 501.402(c)(3) of the Board's regulations (415 ILCS 5/9(a) (2004); 35 Ill. Adm. Code 402(c)(3)). Count II alleges water pollution in violation of Sections 12(a) and (f) of the Act and Sections 302.212(a) and (b), 501.405(a) of the Board's regulations, and Section 580.105 of the Environmental Protection Agency's (Agency) rules. 415 ILCS 5/12(a), (f) (2004); 35 Ill. Adm. Code 302.212(a), (b), 501.405(a), 580.105. Count III alleges water pollution by causing or allowing the ponding and accumulation of livestock waste so as to cause or tend to cause water pollution in violation of Section 12(a) of the Act and Section 501.405(a) of the Board's regulations. 415 ILCS 5/12(a)

(2004); 35 Ill. Adm. Code 501.405(a). The complaint concerns respondents' swine facility located just south of Williamsfield in Elba Township, Knox County.

On June 7, 2005, Murphy Farms moved the Board for a one-day extension and answered the People's second amended complaint. On the same day, Murphy Farms also alleged three affirmative defenses to the alleged violations. Murphy Farms claimed all of the violations alleged in the complaint are barred by the doctrine of *laches* as well as the applicable statutes of limitation. Murphy Farms also alleged the alleged odor violations must be dismissed as unconstitutionally vague. The People moved the Board to strike all three of the affirmative defenses. In its response, Murphy Farms withdraws the statutes of limitations defense. After considering the parties' arguments, the Board grants the People's motion to strike the remaining two defenses, yet allows Murphy Farms to re-plead the defense of *laches* in an amended or supplemental answer.

LEGAL FRAMEWORK

Section 3.115 of the Act defines "air pollution" as:

presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.115 (2004).

Section 3.165 of the Act defines "contaminant" as:

any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source. 415 ILCS 5/3.165 (2004).

Section 9(a) of the Act states that no person shall:

Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois . . . or so as to violate regulations or standards adopted by the Board under this Act. 415 ILCS 5/9(a) (2004).

MOTION TO STRIKE AFFIRMATIVE DEFENSES

Standard of Review

The Board's procedural rules provide that "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 have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

The Board has also defined an affirmative defense as a “response to a plaintiff’s claim which attacks the plaintiff’s legal right to bring an action, as opposed to attacking the truth of claim.” Farmer’s State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n. 1 (Jan. 23, 1997) (quoting *Black’s Law Dictionary*). Furthermore, if the pleading does not admit the opposing party’s claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Warner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, only attacking the legal sufficiency of the facts. Int. Ins. Co. v. Sargent and Lundy, 242, Ill. App. 3d 614, 630-31, 609 N.E.2d 842, 853-54 (1st Dist. 1993); citing Raprager v. Allstate Ins. Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787 (1989). “Where the well-pleaded facts of an affirmative defense raise the possibility that the party asserting them will prevail, the defense should not be stricken.” Int. Ins., 609 N.E.2d at 854.

Murphy Farms’ Laches Allegations

In its answer, Murphy Farms alleged that the second amended complaint must be dismissed in its entirety because the claims against Murphy Farms are barred by *laches*. Am. Ans. at 1. Murphy Farms alleges that during 1996 and 1997 representatives from Murphy Farms and the Highlands spoke with Mr. Ackerman, of the Agency, about plans to construct a new hog farm. Murphy Farms states that on September 4, 1996, Mr. KammueLLer, Manager of the Agency’s Peoria’s Regional Office wrote a letter to Murphy Farms stating “[t]he description you provided of the new facility indicates that a potential for possible odor problems does exist.” *Id.* at 2. Murphy Farms contends that a letter written by Mr. KammueLLer dated May 20, 1997 contains a similar statement. *Id.*

Construction of the Highlands’ farm, in accordance with the plans as reviewed by the Agency, began in 1997. The Agency inspected the farm in April 23, 1998, once the farm was complete and operational. Am. Ans. at 2. Murphy Farms stated that “[t]he Complainant¹ did not attempt to contact Highlands or Murphy before or during the construction of the Highlands’ farm to inform Highlands or Murphy that the farm’s location or operations would violate the Act.” *Id.* at 3.

Murphy Farms contends that when Murphy Farms and the Highlands presented the Agency with the proposal for the new swine production facility, the Agency’s failure to object to the proposed location at that time prejudiced Murphy Farms. Am. Ans. at 4. Murphy Farms states that both it and Highlands relied on the Agency’s omission to object to the proposed location in believing that the farm complied with the Act. If Highlands and Murphy Farms had known that the farm’s location and operation would violate the Act, Murphy Farms argues that Highlands could have changed the location and operations of the farm. For these reasons, Murphy Farms claims that the affirmative defense of *laches* bars the People’s complaint. *Id.* at 4-5.

¹ The Board assumes Murphy Farms is referring to the Agency.

The People's Arguments

The People's primary argument is that Murphy Farms had notice and knowledge long before constructing the facility of the Agency's recommendation that the location and operation of the swine facility be carefully evaluated due to the potential for odor emissions. Mot. at 2. The People state that even equipped with that knowledge, Murphy Farms proceeded with construction of the facility. Because Murphy Farms proceeded at its own risk, the People argue Murphy Farms eliminated the availability of *laches* as an affirmative defense. Mot. at 3.

The People argue that letters sent by Mr. Kammuehler to representatives of both the Highlands and Murphy Farms stated that the Agency had neither siting or construction permit authority and could not approve or disapprove the proposed location and construction. Mot. at 4. The People further contend that the letters specifically cite to Section 9(a) of the Act, the Act's air pollution prohibition, and warn the respondents that compliance with the regulatory setback provisions applicable to a livestock operation does not constitute a shield from potential air pollution violations. *Id.*

According to the People, the respondent's claim that the Agency did not conduct an inspection of the facility until April 23, 1998, is false. The People state that inspections were conducted on August 26, 1997 and on October 16, 1997. Mot. at 5; citing Kammuehler Exh. 3 and 4. The People reiterate that the respondents knew that the Agency believed the location of the Highlands facility had the potential to result in violation of the Act, yet nonetheless proceeded with its construction and operations. Where the circumstances indicate that the party knowingly violated a restriction or a right and pressed ahead, argues the People, *laches* may not be used as an affirmative defense. Petty v. First Nat. Bank of Geneva, 225 Ill. App. 3d 539, 588 N.E.2d 412 (2d Dist. 1992); Fick v. Burnham, 251 Ill. App. 333 (1929).

Murphy Farm's Response the Motion to Strike

Murphy Farms claims the People's motion to strike is untimely because it was filed more than six months after the amended affirmative defense based on *laches*. Resp. at 2; citing 35 Ill. Adm. Code 101.506 (requiring all motions to strike a pleading to be filed within 30 days after the service of the challenged document); People v. Skokie Valley Asphalt Co., PCB 96-98 slip op. at 6 (June 5, 2003).

Further, Murphy Farms argues that the People references material not in the pleadings. Consequently, Murphy Farms asserts that the Board should not consider these extraneous materials because a motion to strike should only address the sufficiency of the allegations that appear on the face of the pleadings. Resp. at 3.

Murphy Farms claims that the People do not argue that Murphy Farms has not adequately plead the elements necessary to constitute *laches*, but rather contests the validity of facts relied on by Murphy Farms. Murphy Farms argues that whether the defense has merit should be addressed at hearing, not in pleadings. The defense is legally sufficient as plead, argues Murphy Farms, and the Board should deny the People's motion to strike.

The People's Reply

On May 26, 2006, the People filed a motion for leave to file *instanter* a reply to the motion to strike. The Board grants the People's motion and accepts the reply.

The People argue that the motion to strike is proper because it attacks the legal sufficiency of the defense. The People contend that the facts Murphy Farms has pled are insufficient to constitute *laches*. Specifically, the People assert that Murphy Farms has failed to plead a lack of due diligence by the Agency or prejudice to itself. Reply at 3. The People conclude that the motion to strike was properly pled and the Board should strike Murphy Farms' amended affirmative defense as legally insufficient. *Id.*

Board Analysis

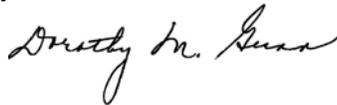
Generally all motions to strike, dismiss or challenge a pleading must be filed within 30 days after service of the pleading unless the Board determines that material prejudice would result. *See* 35 Ill. Adm. Code 101.506. The Board finds that no material prejudice would result from allowing Murphy Farms to address the merits of the affirmative defense of *laches* at hearing. The People did not request additional time to file a motion to strike within 30 days of service of the amended affirmative defense. Accordingly, the Board denies the motion to strike as untimely.

Conclusion

The Board denies the People's motion and directs the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 15, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board