

ILLINOIS POLLUTION CONTROL BOARD
January 6, 2011

INDIAN CREEK DEVELOPMENT)
COMPANY, an Illinois partnership,)
individually as beneficiary under trust 3291)
of the Chicago Title and Trust Company,)
dated December 15, 1981, and the CHICAGO)
TITLE AND TRUST COMPANY, as)
trustee under trust 3291, dated December)
15, 1981,)

Complainants,)

v.)

THE BURLINGTON NORTHERN)
SANTA FE RAILWAY COMPANY,)
a Delaware corporation,)

Respondent.)

PCB 07-44
(Citizens Enforcement – Land, Water)

ORDER OF THE BOARD (by T.E. Johnson):

The Board today rules upon the complainants' motion to strike a portion of the respondent's five-year statute of limitations affirmative defense. The complainants, Indian Creek Development Company, individually and as beneficial owner, and the Chicago Title and Trust Company, as trustee (collectively, Indian Creek), filed a three-count complaint against the Burlington Northern Santa Fe Railway Company (BNSF). The case concerns the alleged release of diesel fuel due to two trains colliding in 1993 at BNSF's Kane County property. In its complaint, Indian Creek pleads that the resulting contamination has migrated and continues migrate to Indian Creek's neighboring property. In its amended answer, BNSF pleads that the complaint is barred by the statute of limitations. For the reasons below, the Board grants Indian Creek's motion to strike three paragraphs of BNSF's affirmative defense.

In this order, after summarizing the procedural history of the case, the Board describes the complaint, the affirmative defense, and the parties' arguments for and against striking part of BNSF's statute of limitations pleading. The Board then discusses its ruling.

PROCEDURAL HISTORY

Indian Creek filed the complaint on December 4, 2006 (Comp.). On March 15, 2007, the Board accepted the complaint for hearing, denying BNSF's motion to dismiss the complaint as duplicative of a State enforcement action brought against BNSF in Kane County Circuit Court, No. CH KA 95 0527. BNSF filed an answer to the complaint on May 17, 2007, raising six alleged affirmative defenses. Indian Creek filed a motion to strike the affirmative defenses on

June 25, 2007. After responsive filings were made, the hearing officer conducted numerous telephonic status conferences as the parties discussed settlement and outstanding issues. On June 18, 2009, the Board granted Indian Creek's motion, striking all six alleged affirmative defenses. In the same order, the Board granted BNSF leave to plead, with adequate factual specificity, the stricken affirmative defenses of the five-year statute of limitations, waiver, estoppel, and laches.

On July 20, 2009, BNSF filed its amended answer (Am. Ans), pleading only one affirmative defense: the five-year statute of limitations (735 ILCS 5/13-205 (2008)). On August 13, 2009, Indian Creek filed a motion to strike three paragraphs from the affirmative defense (Mot.). On August 31, 2009, BNSF filed a response to Indian Creek's motion (Resp.). On September 8, 2009, Indian Creek filed a reply, but without requesting leave to do so. The Board accepts Indian Creek's reply (Reply), however, because the reply helps to clarify the nature of the relief sought by the motion (discussed below), and BNSF has never objected to the reply. Since September 8, 2009, the hearing officer has conducted a number of telephonic status conferences while the parties have continued to discuss settling the case.

INDIAN CREEK'S COMPLAINT

Indian Creek alleges that BNSF violated Sections 12(a), 12(d), and 21(e) of the Environmental Protection Act (415 ILCS 5/12(a), 12(d), 21(e) (2008)). Comp. at 7, 10, 14. According to Indian Creek, BNSF violated these provisions by (1) threatening and eventually causing and allowing the ongoing discharge of diesel fuel contaminants onto the soil and into the groundwater on and under Indian Creek's property so as to cause and tend to cause water pollution; (2) depositing diesel fuel contaminants upon the land so as to create a water pollution hazard on the BNSF and Indian Creek properties; and (3) abandoning and disposing of diesel fuel and diesel fuel contaminants under the BNSF property and the Indian Creek property, neither of which meets the requirements for a waste disposal site. *Id.*

Indian Creek seeks an order from the Board requiring, among other things, that BNSF cease and desist from further violations, that remediation be performed at the BNSF and Indian Creek properties, and that BNSF reimburse Indian Creek for past and future costs and expenses related to the alleged contamination. Comp. at 8-10, 11-13, 14-16. According to the complaint, "[t]his case is a refiling of Kane County [Circuit Court] case number 04 L 607 filed on or about December 7, 2004," by Indian Creek against BNSF. *Id.* at 6.

BNSF'S AFFIRMATIVE DEFENSE

Citing the Illinois Code of Civil Procedure (735 ILCS 5/13-205 (2008)), BNSF pleads its five-year statute of limitations affirmative defense as follows:

1. Complainant admits in its Complaint that "[o]n or about late October or November, 2000, Indian Creek excavated a small portion of a building floor on [Indian Creek's site] . . ." and "[d]uring the excavation, an odor was noted and free product and apparently contaminated soil and groundwater were observed." (Compl. ¶¶ 12-14).

2. Shortly, thereafter, upon information and belief, Indian Creek identified the contamination as diesel fuel.
3. Indian Creek notified BNSF that it had identified petroleum contamination purportedly resulting from the 1993 accident in late 2000 or early 2001.
4. In that same time frame, BNSF removed soil from [Indian Creek's site].
5. Indian Creek did not file the instant action until December 4, 2006, more than 5 years after the date that it first discovered the contamination and formed its opinion that BNSF was at fault.
6. The Kane County [Circuit Court] lawsuit [against BNSF, brought and] referenced by Indian Creek[,] was dismissed with leave to reinstate, which order has been extended a number of times.
7. Currently, the Kane County lawsuit may be reinstated by Indian Creek prior to November 23, 2009.
8. Indian Creek has not reinstated the Kane County lawsuit. Am. Ans. at 11.

PARTIES' ARGUMENTS

Indian Creek's Motion to Strike

Indian Creek argues that paragraphs 6 through 8 of BNSF's affirmative defense do not support the statute of limitations defense and their relevance is "complete guesswork." Mot. at 3, 4. According to Indian Creek, these paragraphs do not allege "ultimate facts as are required," but instead may be a "premature response to Indian Creek[']s expected answer to the statute of limitations defense." *Id.* Indian Creek asserts that this "improper surplusage" should be stricken, not as a "hyper technical application of the law of pleadings," but because the "[t]he pleadings determine the scope of admissible evidence." *Id.* at 4. Moreover, Indian Creek continues, striking paragraphs 6 through 8 "prevents future claims that the surplus language means something or constitutes some sort of defense or support for a defense that cannot presently [be] imagined by either party much less properly pled." *Id.*

BNSF's Response

BNSF responds that while paragraphs 6 through 8 "may not typically be necessary for a statute of limitations affirmative defense," they do allege "ultimate facts as Indian Creek, itself, first raised [Indian Creek's] Kane County lawsuit in its Complaint and stated that the matter before the Board is a refiling of that matter." Resp. at 3. BNSF argues that paragraphs 6 through 8 of the affirmative defense pleading must be liberally construed so as to accomplish substantial justice between the parties. *Id.* According to BNSF, the paragraphs are intended to put the Board and Indian Creek on notice of BNSF's argument "as to why the statute of limitations has

run.” *Id.* BNSF concludes that if the Board determines that paragraphs 6 through 8 do not conform to pleading requirements, the Board “can only strike those paragraphs and not the entire affirmative defense.” *Id.* at 4.

Indian Creek’s Reply

Indian Creek maintains that BNSF’s response to the motion “completely ignores both the lack of relevancy and the lack of materiality” of paragraphs 6 through 8 to the statute of limitations defense. Reply at 3. “A proper affirmative defense,” continues Indian Creek, “would merely raise the statute of limitations defense,” after which Indian Creek could plead that “the limitations period has not run and was tolled by the filing of the Kane County case.” *Id.* After that, BNSF could plead that “the prior filed case failed to toll the statute of limitations because of some unstated and unpled reasons possibly related to the dismissal with leave to reinstate.” *Id.* Indian Creek asserts that “neither the Board nor Indian Creek are required to guess” what paragraphs 6 through 8 mean. *Id.* at 4.

According to Indian Creek, if BNSF believes that the issue of whether the Kane County case is timely reinstated gives BNSF an argument that the instant case is time barred, BNSF “should move to amend its affirmative defense and/or file a motion to dismiss at that time.” Reply at 4. Absent the instant motion to strike, Indian Creek argues, BNSF “would not [be] forced to litigate or even properly plead the Kane County case’s impact on the statute of limitations until the hearing or, perhaps, post hearing motions.” *Id.*

DISCUSSION

An affirmative defense is a “response to a [complainant’s] claim which attacks the [complainant’s] *legal* right to bring an action, as opposed to attacking the truth of claim.” Farmers State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2, n.1 (Jan. 23, 1997), (emphasis in original) (quoting *Black’s Law Dictionary*). In an affirmative defense, the respondent alleges “new facts or arguments that, if true, will defeat . . . [the complainant’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).

Under the Board’s procedural rules, “[a]ny 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). The “facts establishing an affirmative defense must be pleaded with the same degree of specificity required by a plaintiff to establish a cause of action.” International Insurance Co. v. Sargent and Lundy, 242 Ill. App. 3d 614, 630, 609 N.E.2d 842, 853 (1st Dist. 1993). To set forth “a good and sufficient . . . defense, a pleading must allege ultimate facts sufficient to satisfy each element of the . . . affirmative defense pled.” Richco Plastic Co. v. IMS Co., 288 Ill. App. 3d 782, 784-85, 681 N.E.2d 56, 58 (1st Dist. 1997).

A motion to strike an affirmative defense admits well-pled facts constituting the defense, as well as all reasonable inferences that may be drawn therefrom, and attacks only the legal sufficiency of the facts. See Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539

N.E.2d 787, 791 (2nd Dist. 1989). Where the well-pled facts of an affirmative defense and reasonable inferences drawn therefrom raise the possibility that the party asserting them will prevail, the defense should not be stricken. *Id.*

BNSF pleads the affirmative defense of the five-year statute of limitations, relying upon Section 13-205 the Illinois Code of Civil Procedure:

Five year limitation. Except as provided in Section 2-725 of the “Uniform Commercial Code”, approved July 31, 1961, as amended, and Section 11-13 of “The Illinois Public Aid Code”, approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued. 735 ILCS 5/13-205 (2008).

For its statute of limitations affirmative defense, BNSF alleges eight paragraphs of facts in its amended answer. Paragraphs 1 through 5 of the affirmative defense allege, among other things, that Indian Creek’s complaint was filed with the Board on December 4, 2006, more than five years after Indian Creek, in “late 2000 or early 2001,” both discovered the petroleum contamination and determined that the contamination resulted from the 1993 accident. Am. Ans. at 11; *see also* Resp. at 2, 4.

Only paragraphs 6 through 8 of the affirmative defense, however, are the subject of Indian Creek’s motion to strike. It is true that Indian Creek’s motion is entitled “Motion to Strike [BNSF’s] Affirmative Defense,” and the motion asks that the Board “enter an order striking Respondent’s affirmative defense[.]” Mot. at 1, 4; *see also* Resp. at 2. Nevertheless, the substance of Indian Creek’s motion addresses paragraphs 6 through 8 only (Mot. at 2-4), and Indian Creek’s reply states that Indian Creek “moved to strike paragraphs 6 through 8 inclusive” (Reply at 2). The Board finds that Indian Creek’s motion challenges only paragraphs 6 through 8 of BNSF’s affirmative defense.

To rule upon Indian Creek’s motion to strike, the Board need not determine whether the statute of limitations applies in this case. Paragraphs 6 through 8 of the affirmative defense refer to the dismissal of Indian Creek’s Kane County Circuit Court action, and concentrate on the potential for Indian Creek to “reinstate” that action by the extended deadline of November 23, 2009. Am. Ans. at 11. Indian Creek’s complaint before the Board does allege that the instant case is a “refiling” of Indian Creek’s court case filed on or about December 7, 2004, which was “voluntarily dismissed” on November 21, 2006. Comp. at 6, Exh. C (court’s dismissal order). BNSF’s amended answer denies the complaint’s allegation that the proceeding before the Board is a “refiling” of the court case (Am. Ans. at 6), but BNSF did not file a motion to strike the allegation from the complaint or to dismiss the complaint as time-barred.

The Board’s June 18, 2009 order granted BNSF leave to plead the five-year statute of limitations defense with sufficient facts. Paragraphs 6 through 8 do not plainly allege ultimate facts constituting elements of the statute of limitations defense, which BNSF appears to concede

(Resp. at 2, 3, 4). The paragraphs fail to reasonably inform Indian Creek of what it is being called upon to meet. Nowhere does BNSF explain the legal import of paragraphs 6 through 8. The Board will not, under the auspices of liberal construction, speculate about what bearing the three paragraphs might have on the affirmative defense being pled.

Under these circumstances, the Board grants Indian Creek's motion to strike paragraphs 6 through 8 of BNSF's affirmative defense. Nothing in this order, however, precludes the parties from addressing, through proper motion or pleading before hearing, the applicability of the statute of limitations to this case and any related significance of Indian Creek's Kane County court proceeding.

Finally, the Board notes that BNSF's amended answer asks that the Board "award BNSF its costs and expenses." Am. Ans. at 10, 11. As the Board lacks the authority to make the requested award, the Board, on its own motion, strikes these requests of BNSF. *See Malinowski v. Chicago Transit Authority*, PCB 10-36, slip op. at 2, n.1 (Jan. 21, 2010).

CONCLUSION

On Indian Creek's motion, paragraphs 6 through 8 of BNSF's statute of limitations affirmative defense are stricken from the amended answer. Paragraphs 1 through 5 of the affirmative defense, which were beyond the scope of Indian Creek's motion, remain in the amended answer. On the Board's motion, BNSF's requests for costs and expenses are stricken from the amended answer.

SUMMARY

1. The Board grants Indian Creek motion to strike paragraphs 6 through 8 of the five-year statute of limitations defense pled in BNSF's amended answer.
2. On its own motion, the Board strikes the requests for costs and expenses from BNSF's amended answer.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 6, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board