

ILLINOIS POLLUTION CONTROL BOARD
May 19, 2016

JOHNS MANVILLE,)
)
 Complainant,)
)
 v.) PCB 14-3
) (Enforcement)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

ORDER OF THE BOARD (by J.A. Burke):

Johns Manville (JM) alleges that the Illinois Department of Transportation (IDOT) violated Section 21 of the Environmental Protection Act (Act) by disposing asbestos waste at a site in Waukegan, Lake County. 415 ILCS 5/21 (2014). JM has since filed a second amended complaint, adding allegations relating to the State of Illinois's ownership interest in a right-of-way at the site. IDOT's answer to the second amended complaint (Ans.) included eight affirmative defenses, of which JM moves to strike three (Mot.). IDOT responded to the motion (Resp.), and JM filed a motion for leave to file a reply, along with its reply (Reply). IDOT objects to JM's motion for leave to file a reply. After a review of both parties' arguments, the Board grants the motion for leave to file a reply. *See* 35 Ill. Adm. Code 101.500(e).

For the reasons below, the Board grants JM's motion to strike and strikes IDOT's fifth, sixth, and seventh affirmative defenses.

TIMING AND SCOPE OF AFFIRMATIVE DEFENSES

JM contends that IDOT's affirmative defenses go beyond the new allegations added to the second amended complaint. Mot. at 7. Particularly, IDOT included three new affirmative defenses. *Id.* According to JM, these affirmative defenses target not only the new allegations, but the entire second amended complaint. *Id.* at 8. JM states that the additional affirmative defenses are filed too late and allowing them would prejudice JM because it will not have sufficient opportunity to respond to these affirmative defenses. *Id.* at 9. IDOT responds that the Board did not limit its ability to file affirmative defenses. Resp. at 3. IDOT further argues that JM is not prejudiced because the defenses were timely filed well in advance of the hearing and the closing of discovery. Resp. at 3, 4, 7. JM replies that written discovery had already closed, and that discovery on the affirmative defenses has not been allowed. Reply at 5.

The Board's procedural rules require that facts constituting an affirmative defense be set forth before hearing in the answer or supplemental answer, unless the affirmative defense could not have been known before hearing. 35 Ill. Adm. Code 103.204. The Board accepted JM's second amended complaint on March 3, 2016, and provided IDOT an opportunity to answer that

complaint by April 12, 2016. IDOT filed its answer and affirmative defenses on that date and in advance of the scheduled hearing. The Board's procedural rules provide parties the opportunity to set forth affirmative defenses in an answer, as happened here. The Board finds that IDOT acted appropriately, and that JM is not prejudiced by having to prepare for those defenses with the hearing at least a month after the filing.

AFFIRMATIVE DEFENSE FIVE
BOARD AUTHORITY TO ORDER IDOT PARTICIPATION IN CLEAN-UP

IDOT's fifth affirmative defense contends that the Board does not have statutory authority to require IDOT's participation in the implementation of a remedy that the United States Environmental Protection Agency (USEPA) ordered JM and Commonwealth Edison to perform. Ans. at 32. This is not an affirmative defense. An affirmative defense asserts new matter that, if true, defeats a claim even if all allegations in the complaint are true. People v. Community Landfill Company, Inc., PCB 97-193, slip op. at 3 (Aug. 6, 1998). An argument that attacks the sufficiency of a claim is not an affirmative defense. Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222 (4th Dist. 1984). IDOT is not raising new matter that, if true, defeats JM's claims. Rather, IDOT's defense relates to the remedy sought by JM. Because the affirmative defense pertains to remedy, and not the cause of action, it does not defeat JM's claim. Indian Creek Development Co., et al. v. Burlington Northern Santa Fe Railway Co., PCB 07-44, slip op. at 5 (June 18, 2009). The Board therefore grants JM's motion to strike IDOT's fifth affirmative defense. However, IDOT is not precluded from presenting evidence or arguments on this matter for any remedy analysis by the Board. *Id.*

AFFIRMATIVE DEFENSE SIX
FAILURE TO NAME NECESSARY PARTIES

In affirmative defense six, IDOT contends that JM has failed to name necessary parties, specifically Commonwealth Edison (ComEd) and USEPA, in this action. Ans. at 33. JM argues that failure to join a necessary party is not an affirmative defense. Mot. at 10, citing People v. Peabody Coal Co., PCB 99-134, slip op. at 9 (June 5, 2003). Rather, JM believes that IDOT should move the Board to join that party or file a third-party complaint against the party. *Id.*, citing 35 Ill. Adm. Code 101.403, 103.206. IDOT responds that the administrative order of consent between JM, ComEd, and USEPA does not allow for deviation from that order without the agreement of all parties involved, and that no enforceable order can be entered without all those parties present in this action. Resp. at 8.

The Board previously found JM's second amended complaint to have sufficiently stated a cause of action against IDOT. Johns Manville v. IDOT, PCB 14-3, slip op. at 3 (Mar. 3, 2016). An affirmative defense does not negate elements of the plaintiff's claim, but rather admits the claim's legal sufficiency. Vroegh v. J&M Forklift, 165 Ill.2d 523, 530; *see also* Community Landfill Company, PCB 97-193, slip op. at 3 (an affirmative defense takes allegations in the complaint as true). By stating that not all necessary parties to this action have been named, IDOT's defense attacks the legal sufficiency of the complaint and does not assert affirmative matter to defeat the claim against IDOT. This is not an affirmative defense, and the Board therefore grants the motion to strike IDOT's sixth affirmative defense.

AFFIRMATIVE DEFENSE SEVEN
ACT AT TIME OF ALLEGED VIOLATIONS

IDOT's seventh affirmative defense asserts that its actions were not violations of the Act at the time those actions were undertaken. Ans. at 34. JM contends this defense does not meet the pleading requirements for an affirmative defense. Mot. at 10-11. IDOT argues that its defense asserts new matter (the version of the Act relevant to actions occurring between 1971 and 1976) that defeats JM's claim. Resp. at 9.

JM's second amended complaint alleges that IDOT continues to violate specific sections of the Act. Comp. at 15. IDOT's defense therefore denies the allegations in the complaint and is not an affirmative defense. Again, an argument that attacks the sufficiency of a claim is not an affirmative defense. Worner, 121 Ill. App. 3d at 222. The Board therefore grants JM's motion to strike IDOT's seventh affirmative defense.

CONCLUSION

For the reasons stated above, the Board grants JM's motion and strikes IDOT's fifth, sixth, and seventh affirmative defenses.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 19, 2016, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board