

ILLINOIS POLLUTION CONTROL BOARD
June 2, 2016

SUSAN M. BRUCE)
)
 Complainant,)
)
 v.) PCB 15-139
) (Citizen's Enforcement – Water)
 HIGHLAND HILLS SANITARY DISTRICT,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by G.M. Keenan):

On July 8, 2015, Susan M. Bruce filed a complaint (Compl.) alleging that the Highland Hills Sanitary District caused sewage discharges that flooded Ms. Bruce's property. In its answer (Ans.), filed on November 3, 2015, Highland Hills asserted eight affirmative defenses. On March 31, 2016, Ms. Bruce filed a motion to strike the affirmative defenses (Bruce Mot.). On April 27, 2016, Highland Hills filed a motion for partial summary judgment (HHSD Mot.). This order resolves both motions.

The Board grants Ms. Bruce's motion to strike the affirmative defenses. They are improperly pled: three affirmative defenses deny facts alleged in the complaint; two affirmative defenses attack the complaint's legal sufficiency and do not assert an affirmative matter; two affirmative defenses lack legal basis; and one affirmative defense only reserves the future right to assert an affirmative defense.

The Board denies Highland Hills' motion for partial summary judgment because the record does not show that there are no genuine issues of material fact—discovery is still ongoing and the scant evidence currently in the record cannot support summary judgment.

MOTION TO STRIKE

An affirmative defense admits the legal sufficiency of the complainant's cause of action, and then asserts a new matter by which the apparent right is defeated.¹ That is, a successful affirmative defense admits all of the allegations in the complaint, but still defeats the claim.² An argument that attacks a claim's sufficiency is not an affirmative defense.³

¹ Worner Agency v. Doyle, 121 Ill. App. 3d 219, 222-223 (4th Dist 1984); Farmers Auto Ins. Ass'n v. Neumann, 2015 IL App. (3d) 140026, ¶ 16.

² People v. Community Landfill Co., PCB 97-193, slip op. at 3 (Aug. 6, 1998).

³ Worner, 121 Ill.App.3d at 222.

Under the Board's procedural rules, facts constituting an affirmative defense must be stated in the answer to a complaint. 35 Ill. Adm. Code 103.204(d). The respondent must plead the affirmative defense with the same specificity necessary to establish a cause of action.⁴ The respondent only must allege the ultimate facts to be proved and does not have to set out evidence.⁵ However, it must allege facts sufficient to support its legal conclusions.⁶

Three Affirmative Defenses Deny the Complaint's Allegations

Several of Highland Hills' affirmative defenses denied Ms. Bruce's allegation that Highland Hills caused the sewage discharges. Compl. at 1.

- The first affirmative defense alleged that severe rainfalls caused several of the sewage discharges. Ans. at 6-9.
- The second affirmative defense alleged that the Flagg Creek Water Reclamation District and Tributary Sources caused several of the sewage discharges. Ans. at 9-10.
- The third affirmative defense alleged that Ms. Bruce failed to maintain the private sewer line on her property, causing several of the sewage discharges. Ans. at 10-11.

These affirmative defenses deny Ms. Bruce's allegation that Highland Hills' actions caused the sewer discharges. Compl. at 1. Because these affirmative defenses do not admit the allegations in the complaint, the Board will strike them.⁷

Two Affirmative Defenses Attack the Complaint's Legal Sufficiency

Two affirmative defenses attack the complaint's legal sufficiency. Furthermore, these defenses reiterate claims that the Board has previously discussed.

- In 1979, the Board ordered Highland Hills to cease and desist causing sewer backups at a property then owned by Mr. Ramon Travieso.⁸ Ms. Bruce stated that she now resides at that property. Compl. at 2. The fourth affirmative defense argued that the Board's order applied only to a residence owned by Mr. Travieso; because Mr. Travieso no longer resides there, the cease and desist order no longer applies to the property. Ans. at 11-12.
- The Illinois Environmental Protection Act was amended in 2003 to allow a third-party to allege the violation of a Board order. 415 ILCS 5/31(d)(1) (2014). The sixth affirmative defense argued that allowing Ms. Bruce to pursue her cause of action today based on a 1979 Board order would be a retroactive application of law. Ans. at 13-14.

⁴ International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630 (1st Dist. 1993).

⁵ People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308 (1981).

⁶ LaSalle National Trust v. Village of Mettawa, 249 Ill.App. 3d 550, 557 (2d Dist. 1993).

⁷ Community Landfill, PCB 97-193, slip op. at 3.

⁸ Travieso v. Highland Hills Sanitary District, PCB 79-72 (Nov. 1, 1979).

These arguments attack the sufficiency of Ms. Bruce's claim and are therefore not affirmative defenses.⁹ Furthermore, the Board has already addressed these arguments in a prior order.¹⁰ The Board will strike these affirmative defenses.

Two Affirmative Defenses Lack a Legal Basis

Highland Hills pled two affirmative defenses without providing any legal basis:

- The fifth affirmative defense argued that because 30 years have passed since the Travieso order, general equity requires the Board to find that it is no longer in effect. Ans. at 12.
- The seventh affirmative defense argued that Board rules prohibit Highland Hills from discharging its sewage into its sanitary sewers, causing occasional overflows into private pipes without legal means to relieve the pressure. Ans. at 14-15.

Highland Hills did not show that these affirmative defenses have any legal basis—it provided no statute, regulation, or case law establishing general equity or impossibility as valid affirmative defenses. Affirmative defenses must be pled with specificity.¹¹ The Board will strike these defenses.

One Affirmative Defense Is Null

The eighth affirmative defense purported to reserve a right to assert a statute of limitations defense for sewer backups that the complaint does not date. Ans. at 15. Highland Hills does not actually assert a statute of limitations defense in its answer, so the Board will strike it. Board rules allow Highland Hills to assert an affirmative defense later if the affirmative defense could not have been known before hearing. 35 Ill. Adm. Code 103.204(d).

MOTION FOR SUMMARY JUDGMENT

The Record Does Not Show There Is No Genuine Issue of Material Fact

The Board may only grant summary judgment when the record shows that there is no genuine issue of material fact. 35 Ill. Adm. Code 101.516(b). However, because little progress has been made on discovery, the record is nearly empty. Although the Hearing Officer established the discovery schedule on December 22, 2015, most discovery deadlines have been held in abeyance since March 10, 2016.¹² On May 4, 2016, both parties agreed to continue

⁹ Worner, 121 Ill. App. 3d at 222.

¹⁰ Board Order at 3-5 (Sept. 3, 2015).

¹¹ International Ins. Co. v. Sargent & Lundy, 242 Ill. App. 3d 614, 630 (1st Dist. 1993).

¹² Hearing Officer Order (Mar. 10, 2016).

holding the discovery deadlines in abeyance.¹³ The record cannot show that there is no issue of material fact, so Highland Hills is not entitled to summary judgment.

Highland Hills submitted an exhibit with its motion for summary judgment—an affidavit by the past president of the District. Exh. A to HHSD Mot. This is currently the only evidence in the record. Ms. Bruce argues that the facts she will seek to develop in discovery may show a genuine issue of material fact.¹⁴ She is entitled this opportunity—at very least, an opportunity to depose the person who offered the affidavit—before the Board can find that there is no genuine issue of material fact. For this reason, the Board will deny Highland Hills’ motion for partial summary judgment.

Furthermore, Highland Hills reprises several arguments that the Board has addressed multiple times. Even if there were no genuine issue of material fact, these arguments would not support summary judgment in its favor. These arguments generally concern the ability of the Board to find that Highland Hills violated the 1979 Board order in Travieso. HHSD Mot. at 7. The Board has already ruled on this matter several times.¹⁵ Because this matter has been addressed in depth before, the Board will not again address it here.

ORDER

Susan M. Bruce’s motion to strike Highland Hills Sanitary District’s eight affirmative defenses is granted.

Highland Hills Sanitary District’s motion for partial summary judgment is denied.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 2, 2016, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board

¹³ Hearing Officer Order (May 4, 2016).

¹⁴ Bruce Resp. to HHSD Mot. at 1.

¹⁵ Board Order at 8 (June 4, 2015), Board Order at 3 (Sept. 3, 2015).