ILLINOIS POLLUTION CONTROL BOARD
July 26, 2001

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 01-150
	)	(Enforcement – Water)
MARC DEVELOPMENT CORPORATION, an Illinois corporation, and SILVER GLEN ESTATES HOMEOWNERS' ASSOCIATION, a not-for-profit corporation,	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by S.T. Lawton):

On June 5, 2001, respondent, Silver Glen Estates Homeowners' Association (Silver Glen) filed an answer and the affirmative defense of equitable estoppel[1] to the complaint filed on May 4, 2001, in this matter. On July 5, 2001, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (complainant), filed a motion to strike the affirmative defense. Silver Glen filed a response to the motion to strike[2] on July 23, 2001, which requests the Board to deny the complainant's motion to strike or grant leave to refile its affirmative defense. The Board grants the complainant's motion to strike for the reasons below. In summary, the Board finds that the facts as alleged, even if true, do not properly plead an affirmative defense of equitable estoppel.

BACKGROUND

On May 4, 2001, the complainant filed a three-count complaint against respondents, Marc Development Corporation (MDC) and Silver Glen. The complaint alleges that MDC and Silver Glen failed to properly use and maintain a surface spray irrigation wastewater disposal system facility at the Silver Glen subdivision development, located off of Whispering Trails Road in Elgin Township, Kane County, Illinois. This allegedly resulted in violations of operation and construction permits and water provisions under Sections 12(a), 12(b), and 12(f) of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(b), 12(f) (2000)), and Section 306.102(a) of the Board's regulations (35 Ill. Adm. Code 306.102(a)).

[1] The Board notes that Silver Glen listed its affirmative defense as "statutory" estoppel. The Board interprets this to mean equitable rather than collateral estoppel, as argued in the complainant's motion to strike, since the facts more closely lend themselves to this defense.
[2] Silver Glen filed a response to complainant's motion to strike on July 23, 2001, which is referred to as "Resp. at ___."

STANDARD OF REVIEW

The Board's new procedural rules require respondents to include facts constituting an affirmative defense before hearing in either an answer or supplemental answer, unless they could not know of the defense prior to the hearing. See 35 Ill. Adm. Code 103.204(d). In an affirmative defense, a 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 (August 6, 1998), PCB 97-193, slip op. at 3 (citing Black's Law Dictionary 175 (6th ed. 1990)).

"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).

A motion to strike an affirmative defense attacks only the legal sufficiency of the defense. International Insurance Co., 242 Ill. App. 3d at 630, 609 N.E.2d at 854. All well-pleaded facts concerning the defense are taken to be true for the purpose of the motion to strike. *Id.*; see also Berdinie v. Village of Glendale Heights, 139 Ill. 2d 501, 565 N.E.2d 654 (1990). "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." International Insurance Co., 242 Ill. App. 3d at 630, 609 N.E.2d at 854; see also Old Mutual Casualty Co. v. Clark, 53 Ill. App. 3d 274, 368 N.E.2d 702 (1st Dist. 1997).

The Board discusses whether to strike the affirmative defense raised by Silver Glen in the sections below.

ARGUMENTS

Affirmative Defense of Equitable Estoppel

Silver Glen alleged in its June 5, 2001 answer that the Board, under the theory of "statutory" or equitable estoppel, should dismiss the case against it. Silver Glen stated that complainant should be estopped from bringing this action against it because Silver Glen proactively assisted the Illinois Environmental Protection Agency (Agency) in working towards compliance since Silver Glen became aware of the environmental problems in 1996 to 1997. Silver Glen stated that MDC, and its original developer, Mark Kaplan, are the only ones responsible for the environmental violations alleged in the complaint. Ans. at 8-9. Silver Glen stated that its role in this matter has solely been to correct the serious, existing problems caused by MDC and Kaplan. Ans. at 8. It alleges that "it single-handedly solved the environmental problems at significant cost." Resp. at 3.

Silver Glen alleges the following facts in its Answer and Response to Complainant's Motion to Strike:

1. Silver Glen sued MDC for environmental defects in 1997. Resp. at 2.

2. Silver Glen "forced Kane County to institute a new performance bond for Unit 4 of the development to secure environmental compliance with remaining units." Resp. at 2.

3. Once Silver Glen obtained turnover, it kept the Agency informed of all issues concerning the facility. Resp. at 2.

4. Silver Glen initially reported the problems concerning the facilities to the Agency. Resp. at 2.

5. Silver Glen met with the Agency and informed it of any recent developments. Resp. at 2.

6. Silver Glen forced MDC to sell remaining real estate through private litigation to fund the environmental remediation of the facility in the complaint. Resp. at 3.

7. Silver Glen paid over $150,000 collected from 77 to 89 households for the litigation. Resp. at 3.

8. Silver Glen has acted as a catalyst for environmental compliance since 1997. The Agency is aware of its actions. Resp. at 3.

9. The environmental problems in this case were caused solely by Kaplan, the original developer and principal of MDC. Resp. at 3.

Silver Glen alleges in its affirmative defense that deterrence is not an issue because it "did not cause any problems, willfully neglect any obligation or cut corners." Ans. at 8. Silver Glen alleges that, due to its extensive legal and financial efforts to ensure compliance in this matter, naming it as a respondent is an abuse of prosecutorial discretion. Ans. at 9. It states that the complainant only brought action against it after MDC failed to comply with a court order entered in a case brought by Silver Glen in Kane County Chancery Court. Resp. at 4; see also Ans. Exh. A.[3] Silver Glen also states that its proactive involvement and lack of prior violations precludes the Board from assessing any civil penalty against it under Sections 33(c) and 42(h) of the Act. 415 ILCS 5/33(c), 42(h) (2000).

Complainant's Motion to Strike

Complainant alleges in its July 5, 2001 motion to strike that Silver Glen's affirmative defense of estoppel is improper because it does not avoid the legal effect or defeat the cause of

[3] The exhibits filed with Silver Glen's June 6, 2001 answer are referred to as "Ans. Exh. __"

action set forth in the complaint. Mot. at 7.[4] Complainant states that it named Silver Glen as a respondent in this matter because it "is the owner of the facility at issue in the complaint, the violations of the Act and the Board Water Pollution regulations are ongoing, and Silver Glen, along with respondent, Marc Development Corporation, caused, threatened, or allowed the continuing violations alleged in the complaint." Mot. at 6-7.

DISCUSSION

Respondent, Silver Glen, alleges that the Board should bar (or "estop") the Agency from proceeding against the respondent because it is not responsible for the violations alleged in the complaint, has no prior history of violations, and has worked with the Agency to ensure that the facility will be brought back into compliance with the Act and Board's regulations. The Board discusses below whether Silver Glen's alleged facts would constitute equitable estoppel.

A party may invoke the doctrine of equitable estoppel when it "reasonably and detrimentally relies on the words or conduct of another." Brown's Furniture v. Wagner, 171 Ill. 2d 410, 432, 665 N.E.2d 795, 806 (1996) (citation omitted). The doctrine of estoppel "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." People v. Chemetco (February 19, 1998), PCB 96-76, slip op. at 10 (quoting Gorgess v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993)). The Illinois Supreme Court is reluctant to apply the doctrine of estoppel against the State because it "may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials." Brown's Furniture, 171 Ill. 2d at 431-32, 665 N.E.2d at 806 (citation omitted); see also Chemetco (February 19, 1998), PCB 96-76, slip op. at 10-11.

A party seeking to estop the government must prove three factors. First, it must prove that it relied on a government agency, its reliance was reasonable, and that it incurred some detriment as a result of the reliance. Chemetco (February 19, 1998), PCB 96-76, slip op. at 11. Second, the party "must show that the government agency made a misrepresentation with knowledge that the representation was untrue." *Id.*; see also Medical Disposal Services v. PCB, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Third, "the government body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government." Chemetco (February 19, 1998), PCB 96-76, slip op. at 11; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806.

Silver Glen does not allege facts in either its answer or its response that fit within the doctrine of equitable estoppel. First, Silver Glen did not allege facts showing that it reasonably and detrimentally relied on the words or conduct of the Agency. Silver Glen alleges that it is not responsible for violations caused by MDC and Kaplan because they were obligated under the contract to follow the Act and Board's regulations. Ans. at 5, 8-9. Nonetheless, it informed the Agency of the environmental problems at the facility, and has worked with the Agency to ensure

[4] On July 5, 2001, complainant filed a motion to strike an affirmative defense raised by Silver Glen, which is referred to as "Mot. at ___."

the facility comes back into compliance with the Act and Board regulations. Ans. at 7-8. Silver Glen does not allege that the Agency ever represented that it would not be included in a future enforcement action over the alleged violations. Since Silver Glen did not allege that it assisted the Agency out of reliance on words or conduct by the Agency, it fails to provide any facts concerning the first factor of equitable estoppel.

Second, Silver Glen fails to allege any facts that address whether the Agency made misrepresentations with knowledge that they were untrue. In fact, Silver Glen does not state that the Agency made any misrepresentations to it concerning its involvement in this case. It only alleges that it assisted the Agency in forcing MDC to comply with the Act and Board regulations. Since Silver Glen did not make any allegations of this nature, it follows that it also did not allege that the Agency said or did anything with knowledge that its words or conduct were untrue.

Finally, Silver Glen did not allege any facts concerning whether the Agency took some affirmative action that should result in equitable estoppel. Silver Glen alleges solely that, since it is not responsible for the violations, the complainant should not have named it as a party to this action. The purpose of the third prong of the test for estoppel is to ensure that the government agency, itself, made the misrepresentations to the party. See Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [of Revenue] employees with respect to tax liabilities."). The allegation that the complainant, the People of the State of Illinois, took affirmative action by including Silver Glen in the case does not address the third factor of equitable estoppel. Silver Glen never alleged that the Agency took affirmative action to promise Silver Glen immunity from prosecution or otherwise induce reliance on the Agency. Since Silver Glen failed to show that the Agency took some affirmative action that misrepresented its situation, it failed to allege any facts concerning the third factor for the defense of equitable estoppel.

Silver Glen did not plead facts that would constitute the affirmative defense of equitable estoppel. At most, Silver Glen's assertions indicate that it has made good faith efforts to achieve compliance. However, compliance has not been achieved here, according to the facts alleged in the complaint and Silver Glen's answer. Even if the facility has come back into compliance with the Act and Board regulations, Section 33(a) of the Act provides that "[i]t shall not be a defense to findings of violations of the provisions of the Act or Board regulations or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation." 415 ILCS 5/33(a) (2000).

The answer may be relevant if the Board finds that Silver Glen violated the Act, and is faced with determining an appropriate amount for a civil penalty. The complainant raises the point that "a defense which speaks to the imposition of a penalty rather than the underlying cause of action is not an 'affirmative defense' to that cause of action." Mot. at 6 (quoting People v. American Waste Processing Ltd. (March 19, 1998), PCB 98-37, slip op. at 7). "The appropriate penalty to be imposed for a violation of the Act is a separate inquiry from whether a violation of the Act has occurred and mitigation issues are only considered once a violation of the Act has been found." Mot. at 6 (quoting People v. Midwest Grain Products of Illinois (August 21, 1997),

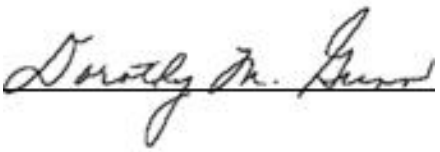
PCB 97-179, slip op. at 7). Silver Glen can present the information it raised in its answer as mitigating evidence at hearing.

CONCLUSION

The Board grants complainant's motion to strike the alleged affirmative defense. Accordingly, this matter will proceed to hearing. Silver Glen will have the opportunity to address all issues raised in its answer at hearing and in its posthearing brief.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 26th day of July 2001 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board