

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD


PEOPLE OF THE STATE OF ILLINOIS,)
)
)
Complainant,) PCB No. 2008 - 045
)
v.) (Enforcement- NPDES)
)
DISTINCTIVE HOMES, LTD., an Illinois limited)
liability corporation, and DISTINCTIVE)
COMPANIES, LTD., an Illinois)
limited liability corporation,)
)
Respondents.)

NOTICE OF ELECTRONIC FILING

TO: James J. Roche Brad Halloran
James J. Roche & Associates Hearing Officer
642 N. Dearborn St. Illinois Pollution Control Board
Chicago, IL 60610-4785 100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that today, April 24, 2008, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following Motion to Strike and Dismiss Respondents', Distinctive Homes, Ltd. and Distinctive Companies, Ltd., Affirmative Defenses a true and correct copy of which is attached and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN,
Attorney General of the State of Illinois

BY: 
NANCY J. TKALSKY
Assistant Attorney General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312) 814-8567

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Complainant,)	
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**MOTION TO DISMISS RESPONDENTS',
DISTINCTIVE HOMES, LTD. AND DISTINCTIVE COMPANIES, LTD.,
AFFIRMATIVE DEFENSES**

NOW COMES COMPLAINANT, People of the State of Illinois, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2006), and moves to dismiss Respondents', DISTINCTIVE HOMES, LTD. AND DISTINCTIVE COMPANIES, LTD., two affirmative defenses. In support thereof, Complainant states as follows:

INTRODUCTION

On February 13, 2008, Complainant filed its Complaint for Injunctive Relief and Civil Penalties ("complaint"), alleging violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.* (2006). On March 27, 2008, Respondents, Distinctive Homes, Ltd. and Distinctive Companies, Ltd. ("Respondents" or "Distinctive"), filed their Answer to Complaint for Injunctive Relief and Civil Penalties ("Answer"), along with two affirmative

defenses. However, Respondents' affirmative defenses are legally insufficient as a response to Complainant's allegations, and should be dismissed.

I. LEGAL STANDARD FOR AFFIRMATIVE DEFENSES

Under Illinois case law, the test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. Condon v. American Telephone and Telegraph Company, Inc., 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2nd Dist. 1991); Vroegh v. J & M Forklift, 165 Ill.2d 523, 651 N.E.2d 121, 126 (1995); People v. Community Landfill Co., PCB 97-193 (August 6, 1998). In other words, an affirmative defense confesses or admits the allegations in the complaint, and then seeks to defeat a plaintiff's right to recover by asserting new matter not contained in the complaint and answer.

Thus, the issue raised by an affirmative defense must be one outside of the four corners of the complaint. The Board rule regarding affirmative defenses provides, in pertinent part, 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 the hearing.

35 Ill. Adm. Code 103.204(d). In addition, Section 2-613(d) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-613(d) (2004), is instructive, providing that "[t]he facts constituting any affirmative defense...must be plainly set forth in the answer or reply."

The facts establishing an affirmative defense must be pled with the same degree of

specificity required by a plaintiff to establish a cause of action. International Insurance Co. v. Sargent & Lundy, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

Dismissal for failure to state a cause of action is appropriate only where it clearly appears that no set of facts can be proven under the pleadings that will entitle the pleader to recovery. Douglas Theater Corporation v. Chicago Title & Trust Company, 288 Ill.App.3d 880, 681 N.E.2d 564, 566 (1st Dist. 1997). As with a Section 2-615 motion, a dismissal based on certain defects or defenses is proper if no set of facts may be proven by which the pleader can recover. Griffin v. Fluellen, 283 Ill.App.3d 1078, 670 N.E.2d 845, 849 (1st Dist. 1996). A pleading must be dismissed for failure to state a cause of action if the facts alleged, when taken as true, do not set forth a legally recognized claim upon which relief can be granted. Kirchner v. Greene, 294 Ill.App.3d 672, 691 N.E.2d 107, 112 (1st Dist. 1998).

II. RESPONDENTS' AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT

A. First Affirmative Defense

Respondents' First Affirmative Defense provides, as follows:

The Metropolitan Water Reclamation District and the Village of Orland Hills issued the requisite permits for the work performed at the Site.

Respondents' First Affirmative Defense pleads no relevant fact whatsoever to defeat the complaint. Instead, this 'affirmative defense' simply alleges a fact not relevant to the violations of the Act and the Board Water Pollution Regulations as alleged in the complaint and provides no additional facts, statute or caselaw that sets forth a legally

recognized defense that defeats Complainant's claim. Therefore, the Respondents' First Affirmative Defense should be dismissed for legal insufficiency.

The complaint alleges that Respondents violated the Illinois Environmental Protection Act, 415 ILCS 5/12(b) and (f) (2006) and the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.202(a) and 309.102(a) when Respondents constructed sanitary sewer lines and engaged in other construction activities at the Site without the requisite permits issued by the Illinois EPA as required by the Act and Board Water Pollution Regulations. In the Respondents' Answer to the Complaint, Respondents admit that the Act and the Board Water Pollution Regulations apply to its ownership and development of the Site, including the construction of sanitary sewer lines and other construction activities, and that it did construct sanitary sewer lines and engage in other construction activities at the Site. In addition, the Respondents assert a new alleged fact, they were issued permits by the Metropolitan Water Reclamation District ("MWRD") and the Village of Orland Hills for work performed at the Site, as an 'affirmative defense'.

Even if Respondents were issued permits from the MWRD and the Village of Orland Hills for work performed at the Site, these were not the same permits the Complainant alleged in its complaint that the Act and Board Water Pollution Regulations require to be issued by the Illinois EPA for the construction of sanitary sewers and other construction activities at the Site. Moreover, permits issued by the MWRD and the Village of Orland Hills to perform work at the Site are not an exception to or requirement of the Act or Board Water Pollution Regulations that might defeat Complainant's right to its claim.

In sum, Respondents can allege no set of facts that would support a defense that the issuance of permits by the MWRD or the Village of Orland Hills to perform work at the Site satisfies the requirement, pursuant to the Act and Board Water Pollution Regulations, of an Illinois EPA issued permit. Therefore, the Respondents' First Affirmative Defense, which does not defeat the Complainant's right to its cause of action upon which relief can be granted, does not meet the legal standard required for an affirmative defense, and should be dismissed with prejudice.

B. Second Affirmative Defense

Respondents' Second Affirmative Defense provides, as follows:

The Metropolitan Water Reclamation District and the Village of Orland Hills inspected and approved the work performed at the Site.

As in its First Affirmative Defense, Respondents' Second Affirmative Defense pleads no relevant fact whatsoever. Again, this 'affirmative defense' simply alleges a fact not relevant to the violations of the Act and the Board Water Pollution Regulations as alleged in the Complaint and provides no additional facts, statute or caselaw to support a legally recognized defense that defeats Complainant's claim. Therefore, the Respondents' Second Affirmative Defense should be dismissed for legal insufficiency.

In Respondents' Second Affirmative Defense, the Respondents assert a new alleged fact, that work performed at the Site was inspected and approved by the Metropolitan Water Reclamation District and the Village of Orland Hills, as an 'affirmative defense'. Even if work performed at the Site was inspected and approved by the MWRD and the Village of Orland Hills, this alleged fact does not defeat the complaint's allegation that the Act and Board Water Pollution Regulations required

approval by the Illinois EPA for the construction of sanitary sewers and other construction activities at the Site. Moreover, inspections and approval by the MWRD and the Village of Orland Hills for work performed at the Site are not an exception to or requirement of the Act or Board Water Pollution Regulations that might defeat Complainant's right to its claim.

Here again, Respondents can allege no set of facts that would support a defense that an inspection of work performed at the Site by the MWRD or the Village of Orland Hills satisfies the requirement, pursuant to the Act and Board Water Pollution Regulations, of an Illinois EPA approval. Therefore, the Respondents' Second Affirmative Defense, which does not defeat the Complainant's right to its cause of action upon which relief can be granted, does not meet the legal standard required for an affirmative defense, and should be dismissed with prejudice.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order dismissing Respondents', DISTINCTIVE HOMES, LTD. AND DISTINCTIVE COMPANIES, LTD., two Affirmative Defenses, with prejudice.

PEOPLE OF THE STATE OF
ILLINOIS, LISA MADIGAN
Attorney General of the State of Illinois

By: 
NANCY J. TIKALSKY
Assistant Attorneys General
Environmental Bureau
69 W. Washington St., Suite 1800
Chicago, Illinois 60602
(312)814-8567

Date: April 24, 2008

CERTIFICATE OF SERVICE

I, Nancy J. Tikalsky, an Assistant Attorney General, do certify that a true and correct copy of the Motion to Strike and Dismiss Respondents', Distinctive Homes, Ltd. and Distinctive Companies, Ltd., Affirmative Defenses was sent by certified mail with return receipt requested to the persons listed on the Notice of Filing on April 24, 2008.

BY:



NANCY J. TIKALSKY