ILLINOIS POLLUTION CONTROL BOARD
February 12, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 12-35
	)	(Enforcement - Water)
SIX M. CORPORATION, INC., an Illinois Corporation, and WILLIAM MAXWELL,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
JAMES MCILVAIN,	)	
	)	
Necessary Party-Respondent.	)	

ORDER OF THE BOARD (by C.K. Zalewski):

In summary, this order construes two "objections" to respondents' asserted "impossibility" affirmative defense as motions to strike, which are hereby granted.

PROCEDURAL HISTORY

The People of the State of Illinois (People) filed a two-count complaint, against Six M. Corporation, Inc. (Six M), William Maxwell, and Marilyn Maxwell (respondents) on August 25, 2011. The complaint concerns two alleged releases from leaking underground storage tanks (USTs) on May 13, 1996 and March 6, 2006 at respondents' gasoline service station (Walker's Service Station or Walker's Tire Service) at 430 West Clinton Avenue, Farmer City, De Witt County, Illinois. The People allege that respondents 1) caused or allowed groundwater contamination and water pollution as a result of discharges of gasoline containing benzene, toluene, ethylbenzene, and xylenes in excess of Board standards, and 2) failed to timely conduct a site investigation and take corrective action after receiving approval from the Illinois Environmental Protection Agency (IEPA).

The Board accepted the August 25, 2011 complaint for hearing on September 8, 2011. By order of October 6, 2011, the Board granted the People's motion for joinder of James McIlvain as a necessary party[1] under the Board's procedural rules at 35 Ill. Adm. Code 101.403.

[1] In its October 6, 2011 order, the Board related that, in the joinder motion, the People recited:

Mr. McIlvain was served with the complaint, and filed an appearance and assent to the joinder on October 7, 2011. By order of November 17, 2011, the Board granted respondents' motion to dismiss the deceased Marilyn Maxwell from the case, but denied the motion to dismiss William Maxwell. PCB 12-35, slip op. at 1 (Nov. 17, 2011).

Respondents filed their answer to the complaint on December 2, 2011, including the affirmative defense of "impossibility" (Resp. Ans.). The People filed their response to the affirmative defense on December 2, 2011 (Comp. Resp.). In a December 6, 2011 filing, the People objected to the affirmative defense and requested that it be stricken as improper. The People also responded to the affirmative defense's factual assertions. McIlvain filed a response on January 11, 2012 (McIlv. Resp.). McIlvain joined in the People's objection to the "improper" affirmative defense, but also responded to the affirmative defense's factual assertions.

The Board construes the objections/responses of the People and McIlvaine as motions to strike the affirmative defense. The affirmative defense and the responses are set out below.

THE AFFIRMATIVE DEFENSE

Along with their answer to the complaint, respondents put forward the affirmative defense of "impossibility". Ans. at 10. Respondents recite that, as a result of a "suspected UST leak or spill" from Six M's service station property in May 1996, the corporation hired environmental consultant Armor Shield of Illinois (Armor Shield). *Id.* With OSFM approval, Armor Shield pulled 4 tanks from the service station property in June 1996, leaving 3 in operation. *Id.* at 6-7. The affirmative defense recites that

> Thereafter, Armor Shield installed an approximately 295 foot groundwater recovery trench across the properties of Six M and the neighboring property owned by James and Deborah McIlvain . . . This trench was used to collect any contaminated groundwater using an ongoing pump and treat method of remediation.
>
> On July 25, 1997, . . . [the McIlvains] filed a lawsuit against Six M in DeWitt County, Illinois, alleging negligent trespass and nuisance as a result of a release of petroleum from underground storage tanks onto their neighboring property. Their complaint alleged *inter alia* that the release had created and continued to create substantial intrusions on their property, including "the noise and distraction from time to time of activities (including drilling, digging and monitoring) associated with the evaluation or removal of contamination on Plaintiffs' property."

> James McIlvain owns property adjacent to "Walker's Service Station" and located at 407 West Clinton Avenue, Farmer City. As alleged in the Complaint, the McIlvain property was contaminated by the May 13, 1996 LUST incident and this off-site contamination has not been corrected due to the failure of the Respondents to complete corrective action and to comply with all applicable statutory and regulatory response requirements. PCB 12-35, slip op. at 2 (Oct. 6, 2011).

> On or before August 2, 1999, the McIlvains and Six M reached a settlement, which included *inter alia* a payment of $17,000 to the McIlvains without admission of negligence on the part of Six M, but with admission that the release of petroleum from Six M tanks has and would continue to cause damages to the McIlvains, including from future remediation activities.
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> Also on or before August 2, 1999, the McIlvains and Six M entered into an access agreement which "sets forth the conditions upon which the McIlvains will continue to permit access by [Six M] to certain real property belonging to the McIlvains . . . to facilitate the identification, treatment and removal of petroleum contamination . . . of the Property originating from a leaking underground storage tank system located on adjacent property belong (sic) to Six-M." Ans. at 7-8.

Six M asserts that it received reimbursement for the $17,000 payment from the UST fund in 1999. Ans. at 8.

Following dissolution of Armor Shield, Six M retained Applied Environmental Solutions (AES) as its environmental consultant. In 2004, "substantial contaminated soil" was removed from a limited area on the properties of Six M and the McIlvains; soil "samples exceeded Tier 2 objectives for residential ingestion and inhalation, as well as for construction worker inhalation." Ans. at 8. In 2005, the Illinois Environmental Protection Agency (Agency) filed a notice of intent to enforce under Section 31(a) of the Act. 415 ILCS 5/31(a) (2010). *Id.*

Respondents assert that

> In 2006, the remaining underground storage tanks were removed for the reason that they would no longer be selling petroleum. During the tank pull, a representative of the Office of the State Fire Marshall observed contamination in the floor, walls and piping trench and reported that a "[r]elease is suspected to be from spills/overfills, and a previous incident." There was no evidence that any of the tanks themselves had leaked. Ans. at 12-13.

Beginning in 2006, asserting that a new release had occurred not covered by the previous agreement, the McIlvains denied respondents access to their property. Ans. at 13. In 2006, Six M hired CSD Environmental as its new consultant to replace AES, which had gone out of business. In November 2006, CSD Environmental wrote to the McIlvains about a proposed plan to take seven borings around the perimeter of their house to gauge the extent of contamination from the 2004 incident. The McIlvains, by their attorney, again denied access absent a new agreement with additional compensation. *Id.* Respondents felt that "the demand for more money was inappropriate" absent proof that the 2006 tank pull caused contamination on the McIlvains' property. *Id.* at 14.

In October 2007, CSD Environmental presented the Agency with a corrective action plan (CAP) for the 1996 incident "which, *inter alia,* proposed further investigation of any

contamination remaining near the residence following the 2004 excavation." Ans. at 14. The McIlvains wrote to the Agency and objected to the CAP, stating the respondents had no authority to access the McIlvain property, and requested denial of the CAP. On February 13, 2008, the Agency approved the CAP. *Id.*

The affirmative defense goes on to relate, without elaboration, that CDS Environmental "sought weather conditions that would permit investigative drilling on the McIlvains' property under the approved corrective action plan." Ans. at 14. Sometime in 2011, CDS Environmental "withdrew", and Six M hired CWM as environmental consultant. CWM sought property access from the McIlvains in 2011 to perform the CAP, and access was again rejected. Respondents conclude:

> Performance of the approved corrective action plan has been rendered impossible by the McIlvains' refusal to provide access to their property.
>
> While the Board regulations do not require performance of corrective action on an adjoining or off-site property where access is denied, 35 Ill. Admin. Code §732.404(c) (sic), Six M hopes that access will eventually be provided and therefore has so far declined to use the available procedure [of Section 732.411]. Ans. at 14-15.

COMPLAINANT'S RESPONSE

In a December 7, 2011 response, the People first cite to case law concerning the nature of affirmative defenses. The People then object to the assertion of the "impossibility" defense here, on the grounds that this contract principle has no place in this enforcement action under the Act, stating:

> Impossibility derives from common-law doctrines of contract law and has no application to the enforcement of statutory violations. In particular, the impossibility of performance is an affirmative defense to a breach of contract claim. *See, e.g.*, Radkiewicz v.Radkiewicz, 353 Ill. App. 3d 251, 260 (2nd Dist. 2004). It is well settled that the doctrine of impossibility of performance will be applied if there is an unanticipated circumstance that has made the performance of the promise vitally different from what should reasonably have been within the contemplation of the parties when the contract was entered. The doctrine requires that the circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party demonstrate that it has tried all practical alternatives available to permit performance. *See, e.g.*, Illinois-American Water Co. v. City of Peoria, 332 Ill. App. 3d 1098, 1106 (3rd Dist. 2002). Comp. Resp. at 2.

The People then respond to the various factual assertions in the affirmative defense.

MCILVAIN'S RESPONSE

McIlvain filed his response to the affirmative defense on January 11, 2011; no party has objected to the timeliness of the filing of this response. McIlvain begins by stating:

> [a]s a preliminary matter, Mcllvain adopts in its entirety the People's "Objection" to said purported Affirmative Defense [of Impossiblity] as a matter of law. The concept of "Impossibility" has no application to the statutory violations alleged in the People's Complaint. McIlv. Resp. at 1.

McIlvain then responds to the various factual assertions in the affirmative defense. Among other things, he challenges respondents' statement that there is no evidence that the 2006 incident caused contamination on his property. McIlv. Resp. at 4. The response also includes a copy of the August 2, 1999 "full and Final Settlement and Release of Claims" that ended the litigation McIlvain v. Six M Corp., Case No. 97-L-6 (De Witt County Cir. Ct.).

Standard of Review

The Board defines an affirmative defense as the "respondent's allegation of 'new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true.'" Community Landfill, PCB 97-193, slip op. at 3 (Aug. 6, 1998) (quoting *Black's Law Dictionary*). The Board has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." Farmer's State Bank v. Phillips Petroleum Co., PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting *Black's Law Dictionary*).

The Illinois Appellate Court explained in Worner Agency v. Doyle, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984), that if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. Likewise, a defense that merely attacks the sufficiency of a claim fails to be an affirmative defense. *Id.*, 121 Ill. App. 3d at 222-223, 459 N.E.2d 633at 636. In other words, "[t]he test of whether a defense is affirmative and must be pleaded by a 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." *Id.*, 121 Ill. App. 3d at 222, 459 N.E.2d at 636.

The Board's procedural rules for affirmative defenses state that "[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). In addition, the party asserting the affirmative defense must plead it with the same degree of specificity necessary for establishing a cause of action. International Insurance, 242 Ill. App. 3d 614, 630, 609, N.E. 2d 842, 853 (1st Dist. 1993). The party pleading an affirmative defense need not set out evidence, so long as the party alleges the ultimate facts to be proven. People v. Carriage 5 Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E. 2d 1005, 1008-09 (1981). However, legal conclusions that are not supported by allegations of specific facts are insufficient. LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 616 N.E.2d 1297.

The Board previously held that "[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." Elmhurst Memorial Healthcare and Elmhurst Memorial Hospital v. Chevron U.S.A., Inc. and Texaco, Inc, PCB 09-066, slip op. at 21 (March 18, 2010), *citing* Raprager v. Allstate Insurance Co., 183 Ill. App. 3d 847, 854, 539 N.E.2d 787, 791 (2nd Dist. 1989). An affirmative defense should not be stricken "[w]here the well-pleaded facts [of an affirmative defense] . . . raise the possibility that the party asserting the defense will prevail . . .." Raprager, 183 Ill. App. 3d at 854, 539 N.E.2d at 791.

DISCUSSION

The Board finds that respondent's alleged affirmative defense is defective in at least two ways. First, the affirmative defense denies that the 2006 tank pull was the cause of any contamination on the McIlvain property. In so doing, it fails to "give color" to the allegations of the complaint that the 2006 incident caused or allowed water pollution and triggered corrective action requirements. The assertion fails to fall within the dictionary definition of "affirmative defense"-- "respondent's allegation of 'new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true.'" Community Landfill, PCB 97-193, slip op. at 3 (quoting *Black's Law Dictionary*).

Secondly, the contract-law affirmative defense of "impossibility" has no place here, as argued by the People and McIlvain. The Board does not adjudicate contract disputes, and will not adjudicate here what effect the 1999 settlement agreement between the McIlvains and Six M has on the current situation. The circuit courts provide the forum for such disputes. Moreover, the respondents' affirmative defense itself makes clear that the Board's rules embody a remedy where access to neighboring property is refused. The respondents' preference not to use the procedure of 35 Ill. Adm. Code 732.411 does not mean that performance of remediation activities is "impossible."

The Board strikes respondents' affirmative defense.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2012, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board