11/2/90 11-90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
NELLO SANTACROCE AND DOMINIC FANELLI, d/b/a GILROY ASSOCIATES	)	Docket No. TSCA-09-89-0014
	)	
	)	
Respondent	)	

ORDER DENYING MOTIONS TO STRIKE

AFFIRMATIVE DEFENSES AND FOR ACCELERATED DECISION

For the reasons stated in its motion of April 3, 1990,[1] complainant seeks to strike five affirmative defenses of respondent set forth in the latter's amended answer of October 19, 1989. The motion also desires an accelerated decision concerning the issue of respondent's liability.[2] Respondent served its opposition to the motion on April 17. In an order of June 7, a decision on the motion was deferred pending the receipt of additional information concerning respondent's relationship to the transformers in question. To assist the parties in this regard, the Administrative Law Judge (ALJ) issued subpoenas for documents to both parties.

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[1] Unless otherwise indicated all dates are for the year 1990.

[2] For the reasons stated in his order of October 4, 1989, Judge Nissen denied complainant's motion for an accelerated decision with regard to both the liability and penalty questions. The order also granted respondent's motion to amend its complaint.

In a telephone prehearing conference (PHC) of September 13, complainant advised that it did not obtain additional information and hence would not be forwarding any. In the PHC, respondent advised that it would forward documentation to the ALJ which, in its view, would buttress the opposition to the motion. This arrived with a cover letter dated September 27.

Motion to Strike

Respondent's five affirmative defenses stated in the amended answer are set out verbatim:

> 1. Respondents are not liable for any of the Counts alleged in EPA's Complaint on the grounds that Respondents did not own the subject transformer.
>
> 2. If Respondents do own the transformer they did not know they owned it at the time of the purported inspection and said mistake of fact is a complete defense.
>
> 3. Any purported inspection by EPA was made without consent and without a warrant and therefore is an unlawful search and seizure. Any evidence obtained thereby must be suppressed by the court.
>
> 4. Any purported consent to inspect the subject transformer was obtained through improper coercion and constitutes an illegal search and seizure requiring the court to suppress any evidence obtained therein.
>
> 5. Any penalties calculated by Complainant are calculated improperly, failing to take into account the facts and circumstances surrounding the subject events, and therefore is inappropriate.

At the outset some observations are apposite. An "affirmative defense" is "matter constituting a defense; new matter which,

assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary (5th Ed. 1979). Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure.[3] Notwithstanding, the Fed. R. Civ. P. often act as guides. This is particularly true when, as here, the Consolidated Rules of Practice of the U.S. Environmental Protection Agency, 40 C.F.R. Part 22, do not address the question. A motion to strike under the Fed. R. Civ. P. 12 (f), (hereinafter sometimes Rule) is the principle vehicle for objecting to an insufficient defense.[4]

In that striking a portion of a pleading is a drastic remedy and because it is often considered simply a dilatory tactic of the movant, motions under the Rule are received with disfavor and, according to commentators granted infrequently. A motion to strike must state with particularity the ground thereof, and set forth the nature of the relief or type of order sought. Well pleaded facts shall be taken and admitted, but conclusions of law or fact need not be treated in that fashion.[5]

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[3] See, e.g., In the Matter of Katzon Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D. N.Y. 1982); Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

[4] Wright & Miller, Federal Practice and Procedure: Civil § 1380 at 782 (1969).

[5] Id. at 787.

An affirmative defense should be stricken if, for example, it is palpably frivolous or clearly insubstantial in legal or factual significance, or presents a question which the ALJ does not have jurisdiction to rule upon. For example, concerning the latter, an ALJ is precluded generally from passing on the constitutionality of the very procedures he is called upon to administer, in that federal agencies have neither the power nor the competence to pass on the constitutionality of administrative action. Frost v. Weinberger, 375 F. Supp. 1312 (D.C.N.Y. 1974); Finnerty v. Cowen, 508 F. 2d 979 (2d Cir. 1974).

A motion to strike a defense will be denied if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear.[6] The factors to be considered, as outlined in Lunsford v. United States, 418 F. Supp. 1045, 1051 (W.D.S.D. 1976), in determining whether to grant a motion to strike an affirmative defense are:

> 1. Is the defense unrelated to plaintiff's claim?
> 2. Is the defense so clearly legally insufficient as to be unworthy of the court's consideration?
> 3. Is there a factual question present?
> 4. Could the defense succeed under any set of circumstances?
> 5. Would the failure to grant the motion prejudice the moving party?

Also, in William Z. Salcer v. Envicon Equities, 744 F.2d 935, 939 (2d Cir. 1984) it was stated:

> A motion to strike an affirmative defense under Rule 12(f) . . . for legal insufficiency

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[6] 2A Moore's Federal Practice ¶ 12.21[3] at 12-179 (2d ed. 1987).

> is not favored and will not be granted "unless it appears to a certainty that the plaintiffs will succeed despite any state of facts which could be proved in support of the defense." (citation omitted) Moreover, even when the facts are not disputed, several courts have noted that a "motion to strike for insufficiency was never intended to furnish an opportunity for the determination of disputed and substantial questions of law." (citation omitted)

An example of where a motion to strike would be appropriate is one involving a pure question of law. Such a situation would be that concerning whether or not the statute of limitations set out in 28 U.S.C. § 2462 is applicable to an administrative proceeding for the assessment of a civil penalty under the Toxic Substances Control Act. See In the Matter of Tremco, Inc., Incon Division, TSCA-88-H-05 (April 7, 1989); In the Matter of 3M Company (Minnesota Mining and Manufacturing), TSCA-88-H-06 (August 7, 1989).

With the above backdrop, we turn to the affirmative defenses. With regard to the first defense, the ownership of the transformer is a vital factor in that the three counts in the complaint allege that a the time of the inspection respondent "owned and operated" the transformer in question. This defense raises legal and factual issues not yet susceptible to resolution. It is concluded that the motion to strike the first defense should not be granted.

The second defense concerning mistake and the fifth defense pertaining to improper calculation of the penalty will be treated together. It is not necessary to reach and decide here whether or not mistake of fact is a complete defense to liability. This, and

the fifth defense are essentially factors to be weighed in determining the penalty amount; but must an affirmative defense be confined solely to issues involving liability? Many defenses arise in this context, and for this reason, in a technical sense, the answer to the aforementioned question would appear to be in the affirmative. However, the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a)(2)(B), mentions certain factors to be considered in determining the amount of civil penalty, including the "degree of culpability" and the seemingly all-embracing "such other matters as justice may require." In addition, the statutory considerations are explained and elaborated upon in the complainant's Guidelines for Assessment of Civil Penalties under TSCA, 45 Fed. Reg. 59770, 59776 (September 10, 1980). To be observed is that the language quoted by complainant (Motion at 5), after proclaiming strict liability, hastens to add that "some allowance must be based on the extent of the violator's culpability." Common garden intelligence dictates that defenses relating to the penalty question should not, solely for this reason, be amenable to a motion to strike. The Consolidated Rules of Practice, 40 C.F.R. § 22.24, lend support to this. In pertinent part they provide that complainant, in addition to that of establishing liability, has the burden of going forward and proving that the proposed civil penalty is appropriate. Complainant has cited no persuasive legal authority which would preclude the asserting of affirmative defenses concerning the penalty questions under TSCA. A respondent is entitled to present its full defense concerning either liability or penalty, or where,

as sometimes occurs, the evidence will involve both questions. To limit defenses solely to the issue of liability would tend to bifurcate the hearing. It would be less costly and contribute to judicial economy to try all the issues in one proceeding. In the Matter of Shetland Properties, Docket No. TSCA-I-87-1082, Order Denying Complainant's Motion to Strike Affirmative Defense, September 30, 1987. For the aforementioned reasons, it is concluded the motion to strike the second and fifth defenses should not be granted.

The third and fourth defenses raise factual questions concerning the inspection involving the Fourth Amendment and the exclusionary rule. Oftentimes, it is only after the challenged evidence is received and weighed in the totality of the record that a determination can be made properly. Prehearing paper will not suffice. Truth here must be leached out in the sunshine of an evidentiary hearing. Complainant's motion to strike is premature. ALJ cannot rule in a vacuum, or upon mere assertions of the parties. Before making a decision concerning these two defenses, findings have to be made concerning the circumstances surrounding how the allegedly illegal evidence was obtained. This can be done more appropriately and fairly at the termination of the evidentiary hearing, after all the evidence has been evaluated. At that time, after the unfolding of the evidence, complainant, if it remains of the same mind, is at liberty to renew its motion to strike what it perceives as inadmissible evidence from consideration by the undersigned in reaching an initial decision. It is concluded that

complainant's motion to strike the third and fourth defenses not be granted.

Motion for Accelerated Decision

The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), states that the ALJ may grant an accelerated decision at any time,

> without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. (emphasis added.)

In order for complainant's motion to be granted, there must be no question of material fact concerning liability. This is not the case here; there are many facts in contention concerning the ownership or operation of the transformer at issue. For example, in addition to ownership and control, the following questions may need to be answered: Who is responsible for determining that the equipment is in compliance with the law concerning polychlorinated biphenyls? Are there any written agreements between persons concerning the transformer? What has been the prior action of persons? Who has access to the equipment and can take reasonable action in emergencies?

The authorities cited by the parties in the motion and its opposition, while interesting are not clearly dispositive. Each case turns upon its distinctive facts and the law applicable thereto. There are significant and novel questions regarding the ownership, control or responsibility of the transformer in question

and the liability flowing therefrom. The motion for an accelerated decision is like an elephant sitting in a rowboat - it is just not the right vehicle. This matter clamors for a complete hearing.

IT IS ORDERED that complainant's motion to strike respondent's affirmative defenses, and its motion for an accelerated decision be **DENIED**.

IT IS FURTHER ORDERED that complainant arrange for and initiate a telephone prehearing conference in this matter, within 15 days of the below service date, for the purpose, among others, of marking this matter for hearing.

Frank W. Vanderheyden
Administrative Law Judge

Dated: November 2, 1990

IN THE MATTER OF NELLO SANTACROCE AND DOMINIC FANELLI, d/b/a GILROY ASSOCIATES, Respondents,
Docket No. TSCA-09-89-0014

Certificate of Service

I certify that the foregoing Order dated, 11/2/90, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Mr. Steven Armsey
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

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Marion I. Walzel
Secretary

Dated: Nov. 2, 1990