2/5/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF

LaBarge, Incorporated

Defendant

Docket Number:
CWA-VII-91-W-0078

Judge Greene

ORDER GRANTING MOTION FOR DETERMINATION AS TO LIABILITY FOR VIOLATIONS ALLEGED IN THE COMPLAINT

This matter arises under Sections 301(a), 307(d), and 309(g) of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1317(d), and 1319(g), ("the Act").

The complaint herein alleges that Respondent LaBarge, Incorporated, which owns and operates an electronic cable and harness manufacturing facility in Joplin, Missouri, violated Sections 301(a) and 307(d) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1317(d) by the discharge of waste water which contained copper in excess of both federal and local limits to the city-owned Lone Elm and Turkey Creek treatment facility, from

which it would enter Turkey Creek, a navigable water of the United States as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7). The dates of the alleged violations and the amount of copper alleged to have been found in the samples for those dates are set forth in the complaint, where they are juxtaposed with the federal standard[1] and the local copper waste-water limits.[2]

In its answer to the complaint, Respondent did not deny any of the allegations of violations. Neither did it dispute the accuracy of the monitoring reports regarding the amounts of copper detected in the samples taken ("sample values"). Instead, Respondent's responses to the charging paragraphs[3] were that "The statements in this paragraph are conclusions of law and require

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[1] See 40 C.F.R. §§ 413.80, 413.81, 413.84(a), (c), (g), and (h).

[2] Page 3 of the complaint, paragraph 2, "Copper Violations".

[3] Paragraph II.I at page 4 of the complaint, states as follows:

> On the basis of the above Findings, Respondent has violated the provisions of Sections 301(a) and 307(d) of the Act . . . by discharging copper in excess of its local limits and the categorical pre-treatment standards on the dates, or for the periods, and to the extent indicated in Paragraph II.H, above.

Paragraph II.H of the complaint states that

> The sampling and analysis results submitted . . . show that Respondent has discharged copper in excess of the copper limitations of its industrial discharge permits . . . on numerous occasions since at least January, 1988.

no answer."[4],[5] In addition, six affirmative defenses were interposed in the answer. Three of these defenses assert that, for various reasons, the federal government is without authority to proceed in this matter. A fourth states that such action should "be held in abeyance pending the exercise of the City's authority."[6] The others assert "laches, waiver, estoppel, and all other legal and equitable defenses not secifically set forth above."

Complainant moved for summary judgment.[7] In its response to the motion, Respondent denied -- without more -- for the first time that the alleged violations had occurred. And still, the sample values of copper were not disputed. However, the response

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[4] Answer to the complaint, paragraphs II.H and II.I, at 3.

[5] Plaintiff urges that since defendant did not admit, deny, explain, or state that it is without knowledge, as to the factual allegations contained in the complaint with regard to which respondent has any knowledge, the charges have been admitted by defendant.

See 40 C.F.R. § 22.15(b), which provides that "The answer shall clearly and diectly admit, deny, or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue . . . ."

[6] Paragraph IV, Affirmative Defenses, at 3-4 of the Answer.

[7] The motion will be treated as a motion for partial judgment, since it goes only to liability for the violations charged.

did raise another affirmative defense to the effect that as a federal defense contractor engaged in the production of harness for missles, Respondent cannot be held liable for any waste water copper violations that occurred in connection with harness-for-missles production.

Summary Judgment.

It is well settled in every federal judicial circuit that neither mere pleadings, nor mere conclusionary assertions, are sufficient to defeat a motion for summary judgment. See, for instance, *First National Bank of Arizona v. Cities Service Co., Inc.*, 391 U.S. 253, 289 (1968). The "evidence manifesting the dispute must be 'substantial,'" and must go "beyond the allegations of the complaint." *Fireman's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F. 2d 359, 362 (5th Cir. 1945); *Beal v. Lindsay*, 468 F. 2d 287, 291 (2d Cir. 1972); *Securities and Exchange Commission v. Research Automation Corp.*, 585 F. 2d 31, 33 (2d Cir. 1978). In responding to such a motion, a party may not rest upon mere allegations or denials. The responding party must set forth specific facts to show the existence of a genuine issue for trial. No such showing has been made. Indeed, Respondent did not even dispute the government's findings until called upon to respond to a motion for judgment. When it did (barely) raise this issue, Respondent put forward not a single

fact, by affidavit or otherwise, upon which a finding could reasonably be made that a material factual issue remains to be determined. While Respondent is correct in pointing out that the record must be examined in the light most favorable to the defendant, F. R. Civ. Proc. 56, 28 U. S. C. A., such examination occurs only after the opposing party has responded to the motion with something more than denials. This process cannot be used to convert mere denials into something more. Accordingly, it is held that nothing shown here even begins to counter the government's well supported motion.

Affirmative Defenses.

The rules of procedure specify that Respondent must identify in its Anser to the complaint "circumstances or arguments which are alleged to constitute grounds of defense," and "facts which [are to be placed] at issue. . . ."[8] Here, Respondent raised an affirmative defense, by way of a mere assertion, in its response to the summary judgment motion, rather than in the answer. Although Complainant urges that this defense should not be considered, it is determined that the arguments upon which Complainant relies to defeat the "government contractor" defense

[8] 40 C.F.R. § 22.15(b)

are persuasive.[9] These arguments are hereby adopted.

With respect to the affirmative defenses raised, the general rule is that defendant has the burden of supporting any such defenses with a showing sufficient to survive summary determination.[10] Here, as Complainant points out in its motion for partial summary judgment and in its Motion to Strike Affirmative Defenses, Respondent has failed to support any of the defenses with anything more than bare assertions. For the reasons stated in those motions, it is held that none of the affirmative defenses are sufficient to defeat the motion at hand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a Delaware corporation doing business in St. Louis, Missouri, and a "person," within the meaning of Section 502(5) of the Act, 33 U. S. C. § 1362(5). Respondent owns and operates an electronic cable and harness manufacturing facility at 1505 Maiden Lane, Joplin, Missouri, which is a point source within the meaning of Section 502(14) of the Act, and discharges pollutants as defined in Section 502(12) of the Act to the Lone Elm and Turkey Creek wastewater treatment facilities,

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[9] Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision, at 2-5.

[10] See *In the Matter of Standard Scrap Metal Company*, Appeal No. 87-4, August 6, 1990.

owned and operated by the City of Joplin, Missouri, and thence to Turkey Creek, a navigable water of the United States as defined by Section 502(7) of the Act. Respondent is therefore subject to the requirements of the Act.

2. No material factual issue remains to be determined. No affirmative defense raised here constitutes a defense to the violations charged. Complainant is entitled to judgment as a matter of law as to the issue of liability for the violations charged. Accordingly, only the issue of the amount of penalty to be assessed for such violations remains to be determined.

3. Defendant violated Sections 301(a) and 307(d) of the Act, 33 U. S. C. §§ 1311(a) and 1317(d), by the discharge of copper in excess of local limits thereon and in excess of the federal categorical pretreatment standards therefor, on the dates, or for the periods, and to the extent indicated in paragraph II. H. of the Complaint.

ORDER

It is ***ORDERED*** that Complainant's motion for summary judgment shall be, and it is hereby, granted as to Respondent's liability for the violations stated in the complaint.

And it is ***FURTHER ORDERED*** that the parties shall confer for the purpose of attempting to settle the issue of the amount of penalty to be assessed for the violations found, and shall report

upon the status of their settlement effort during the week ending March 15, 1996. It shall be the responsibility of counsel for Complainant to initiate the settlement process.

J. F. Greene
Administrative Law Judge

February 5, 1996
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on February 5, 1996.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF CASE: LaBarge Incorporated
DOCKET NUMBER: CWA-VII-91-W-0078

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