STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 17 of the Environmental Conservation Law of the State of New York ("ECL") and Title 6, Part 750 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")

-by-

C AND J ENTERPRISES, LLC and
JAMES P. BURR, Individually,

Respondents.

RULING ON MOTION TO DISMISS AND MOTION TO AMEND COMPLAINT

DEC Case No.
R5-20160308-2200
(Deerfield Estates
Mobile Home Park)

I. Background

This matter involves allegations by staff of the New York State Department of Environmental Conservation ("Department") that respondents C and J Enterprises, LLC ("C and J") and James P. Burr ("Burr") (collectively "respondents") have violated ECL article 17 and its implementing regulations, 6 NYCRR part 750, and Order on Consent No. R5-20080515-814 ("2008 Order") as follows: (i) failing to comply with deadlines set forth in the 2008 Order; (ii) using and operating a wastewater treatment system without a State Pollution Discharge Elimination System ("SPDES") permit; (iii) failing to comply with effluent limits set in a SPDES permit that was incorporated into the 2008 Order; (iv) failing to comply with monitoring requirements in the 2008 Order; (v) unlawful discharges of sewage; (vi) unlawful bypass of wastewater system components; (vii) exceeding flow limits or design capacity of a wastewater treatment system; (viii) failing to operate and maintain wastewater treatment system facilities; and (ix) altering and impairing the operation of a wastewater treatment system, at property known as Deerfield Estates Mobile Home Park, located in the Town of Perth, Fulton County, New York ("Deerfield Estates"). See generally Complaint dated May 3, 2016 ("Administrative Complaint").

In the Administrative Complaint, staff seeks an order of the Commissioner:

- Holding respondents liable for the violations alleged;
- Imposing on respondents, jointly and severally, a total payable civil penalty of $250,000; and
- Providing such other and further relief as the Commissioner may deem appropriate.

See Administrative Complaint at 51, Wherefore Clause ¶¶ I, II, and IV.

Department staff served the Administrative Complaint on respondent C and J on May 16, 2016, and served respondent Burr on May 20, 2016. See Motion to Amend Complaint dated August 25, 2016 ("Motion to Amend"), Exhibit ("Ex.") 1, Affidavit of Service of Drew Wellette, sworn to May 16, 2016, and Affidavit of Personal Service of Environmental Conservation Officer K. M. Bush, sworn to May 24, 2016, respectively. Counsel for the parties agreed to an extension of respondents' time to answer or move until July 25, 2016. See Pre-Hearing Schedule Memorandum of Chief Administrative Law Judge James T. McClymonds dated June 2, 2016. Respondents served a motion to dismiss the Administrative Complaint on July 21, 2016. On August 25, 2016, Department staff served papers in opposition to the motion to dismiss, and a motion to amend the Administrative Complaint. Respondents thereafter served an attorney's affirmation in reply and opposition dated September 14, 2016.[1]

On behalf of the Department, the New York State Department of Health, and the State of New York, the New York Attorney General commenced on April 26, 2010 an action in New York State Supreme Court relating to Deerfield Estates against both respondents in this proceeding and another individual who has since died. See Affirmation of Assistant Attorney General Morgan Costello dated August 23, 2016 ("Costello Aff."), Ex. 1 (complaint dated April 23, 2010 in State of New York v. C and J Enterprises, LLC, et al., Sup. Ct. Albany County, Index No. 2688-10) ("AG Action"). The AG Action contains five causes of action, summarized below:

- First Cause of Action – Discharge of Sewage into Waters of the State, in violation of ECL §§ 17-0501, 17-0511, 17-0803, 17-0807
- Second Cause of Action – Violations of 2008 Consent Order
- Third Cause of Action – Failure to Maintain Satisfactory Treatment and/or Disposal of Sewage, in violation of Sanitary Code § 17.6(b)
- Fourth Cause of Action – Failure to Keep Sanitary Facilities in Good Working Order, in violation of Sanitary Code § 17.10
- Fifth Cause of Action – Repeated Illegal Business Practice, in violation of New York Executive Law § 63(12)

See Complaint in AG Action at 10-13, ¶¶ 43-61. The complaint in the AG Action alleges that the violations alleged in the first and second causes of action were "continuing" as of the date of the complaint. See id. at ¶¶ 46 and 50.

In papers submitted in opposition to respondents' motion to dismiss, Assistant Attorney General Costello states that she intends to file and serve a motion for partial summary judgment in the AG Action, but is limiting the motion to seeking summary judgment with respect to violations for the period of time ending April 23, 2010. See Costello Aff. ¶¶ 7-8; see also id. ¶ 9 (summary judgment motion with respect to first cause of action will be limited to violations occurring on or before February 9, 2010) and ¶ 10 (summary judgment motion with respect to second cause of action will be limited to violations occurring before April 23, 2010).

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[1] The submissions of the parties with respect to respondents' motion to dismiss and Department staff's motion to amend the complaint are listed in Appendix A hereto.

II. Respondents' Motion to Dismiss

Respondents argue that the Administrative Complaint in this matter should be dismissed "as the DEC along with the Attorney General's office has already commenced an action, on the same grounds, in Supreme Court. As this action is already pending in another forum the Commissioner lacks jurisdiction." Attorney Affirmation Motion to Dismiss dated July 21, 2016 ("Young Aff. I"), ¶ 2. Respondents argue that dismissal is appropriate based upon: (i) election of remedies; (ii) CPLR 3211(a)(4); and (iii) the prohibition of "claim splitting."

A. Election of Remedies

Respondents first cite ECL § 71-1929(1) for the proposition that "DEC relinquished jurisdiction over this matter by commencing the identical action in Supreme Court." Id. at 13 (point heading).

ECL § 71-1929(1) states:

> A person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation, and, in addition thereto, such person may be enjoined from continuing such violation as hereinafter provided. *Violation of a permit condition shall constitute grounds for revocation of such permit, which revocation may be accomplished either as provided in paragraph f of subdivision 4 of section 17-0303 or by order of judgment of the supreme court as an alternate or additional civil penalty in an action brought pursuant to subdivision 3 of this section.*

(italics added). Respondents highlight the word "or" twice in the last sentence of the quoted statute (italicized herein), and argue that this language in effect creates an election of remedies provision that precludes the Department from pursuing both its administrative enforcement proceeding and the judicial action. See Young Aff. I at 13, ¶¶ 30 and 31.

The language upon which respondents rely, however, does not support their argument. The language provides alternative procedures by which revocation of a permit may be accomplished; it is not an election of remedies provision pursuant to which the Department is precluded from commencing an administrative enforcement proceeding if it has asserted other claims in a judicial forum. This matter does not involve an effort to revoke a permit. See generally Administrative Complaint; see also Memorandum of Law: Department Staff's Opposition to Respondents' Motion to Dismiss ("Staff Opp.") at 4-5, ¶ 12 ("Department staff do not seek to revoke an Article 17 permit. Respondents' SPDES Permit expired on January 1, 2004 and was never renewed").

Nor does Orendorff v. Benevolent & Protective Order of Elks Lodge No. 96, 195 Misc. 2d 53 (Sup. Ct. Oneida County), cited by respondents, support respondents' position. The statutory provision at issue in Orendorff, N.Y. Executive Law § 297(9) "provides a clear election of mutually exclusive remedies," unlike ECL § 71-1929(1). Orendorff, 195 Misc. 2d at 58.[2]

B. CPLR 3211(a)(4)

Respondents also cite CPLR 3211(a)(4), which provides in relevant part that a party may move to dismiss causes of action "on the ground that … there is another action pending between the same parties for the same cause of action in a court of any state or the United States." As respondents acknowledge, although the CPLR may be consulted where, as here, the Department's regulations are silent on a particular issue, the CPLR "does not govern administrative enforcement proceedings." Young Aff. I at 13, ¶ 32. Moreover, even were it applicable here, CPLR 3211(a)(4) does not mandate dismissal: "the court need not dismiss upon this ground but may make such order as justice requires." CPLR 3211(a)(4).

Both the judicial and administrative complaints at issue here allege violations of the ECL, regulations and the 2008 Order, but the complaints differ in several important respects. For example, the causes of action in the two proceedings are not identical. In addition to the two causes of action relating to alleged violations of the ECL and the 2008 Order, the complaint in the AG Action contains two causes of action alleging of violations of the New York Public Health Law and the Department of Health's Sanitary Code, 10 NYCRR Part 17, and another claim alleging violations of New York Executive Law § 63(12). See Costello Aff. Ex. 1, Complaint in State of New York v. C and J Enterprises, LLC, Index No. 2688-10, at 12-13, ¶¶ 53-61. Those claims cannot be adjudicated in the Department's administrative proceeding.

Moreover, the causes of action involving alleged violations of the ECL and the 2008 Order also differ in each proceeding. The AG Action was commenced in 2010, whereas this administrative proceeding was commenced in 2016. The Administrative Complaint relates in large part to alleged violations with respect to a "pilot wastewater treatment system" at the site that did not become fully operational until on or about June 15, 2010, approximately six weeks after the verified complaint was filed in Supreme Court. See Administrative Complaint ¶¶ 26, 35-107. Thus, the AG Action does not, and could not, contain allegations of specific violations with respect to the wastewater treatment system that began operating in June 2010.

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[2] Executive Law § 297(9) provides in relevant part:

> Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages …. unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter….
>
> * * *
>
> No person who has initiated any action in a court of competent jurisdiction … may file a complaint with respect to the same grievance under this section.

Although the complaint in the AG Action does allege that the violations asserted therein were "continuing" as of the date of that complaint, the AG's Office and the Department have agreed that the AG's Office would pursue only those violations allegedly occurring up to the April 23, 2010 date of the complaint, and Department would pursue violations occurring after that date. See Costello Aff. ¶ 6. Consistent with that agreement, the AG's partial summary judgment motion will seek judgment only with respect to violations occurring prior to April 23, 2010. See id. ¶¶ 9-10.

Department staff has also filed a motion to amend its Administrative Complaint in this proceeding, to eliminate allegations of violations occurring prior to April 23, 2010, and to remove from proposed penalty calculations any penalty amounts relating to alleged violations occurring prior to April 23, 2010. See generally Motion to Amend.

C. Claim Splitting

Respondents also assert that, "[e]ven if it could be argued that the two actions contain substantive differences, or are somehow limited to different time frames, the assertion of two separate actions pertaining to the same alleged violations violates the bar on claim splitting." Young Aff. I at 15, ¶ 45; see id. at 15-16, ¶¶ 45-48. The claim splitting rule "prohibits two actions on the same claim or parts thereof." Charles E. S. McLeod, Inc. v. R. B. Hamilton Moving and Storage, 89 A.D.2d 863, 864 (2d Dep't 1982). The rule is intended to "prevent[] vexatious and oppressive litigation." White v. Adler, 289 N.Y. 34, 42 (1942).

Case splitting typically involves commencement of two or more actions relating to a single money or contract-related claim. For example, in Century Factors, Inc. v. New Plan Realty Corp., 51 A.D.2d 921 (1st Dep't), aff'd, 41 N.Y.2d 1040, 1040-41 (1977), cited by respondents, plaintiff's first action sought recovery of principal amounts due under guarantees executed by defendant. Plaintiff thereafter commenced a second action seeking attorneys' fees under the same guarantees. The trial court denied defendant's motion to dismiss the complaint, but the appellate division unanimously reversed, stating in relevant part:

> The obligation of the defendant, though consisting of two promises, is in truth a single obligation requiring the plaintiff to assert its full claim in one action. Failure to do so results in the splitting of a cause of action which is prohibited.

51 A.D.2d at 921. The Court of Appeals affirmed. See 41 N.Y.2d at 1040-41.

Similarly, in Hamlet Homeowners Associates, Inc. v. Souza, 13 Misc.3d 87 (Sup. Ct. App. Term 2006), also cited by respondents, the court found that plaintiff improperly commenced two actions simultaneously seeking unpaid common charges and late fees for different periods of time. The court stated: "When more than one installment is due upon a contract, the claims for all installments are merged into a single cause of action and must be included in a single action." Id. at 88; see also Rocco v. Badalamente, 20 Misc.3d 130, 2008 WL 2763583, at *1 (Supreme Ct., Appellate Term 2008) (same).[3]

[3] In Hamlet, plaintiff commenced two actions rather than one to avoid exceeding the jurisdictional limits of the Justice Court. See id.; see also Yarmosh v. Lohan, 16 Misc.3d 1119(A), 2007 WL 2254342, at *2 (Dist. Ct., Suffolk

A party invoking claim splitting "must show that the challenged claim raised in the second action is based upon the same liability in the prior action, and that the claim was ascertainable when the prior action was commenced." Melcher v. Greenberg Traurig LLP, 135 A.D.3d 547, 552 (1st Dep't 2016); see also Rocco, 2008 WL 2763583, at *1 (installments or charges accruing after the commencement of the first suit "may be the subject of a subsequent suit"); Curtis v. Citibank, N.A., 226 F.3d 133, 140 (2d Cir. 2000) (reversing trial court's dismissal of "duplicative" claims regarding events arising after an earlier complaint was filed).

Claim splitting does not apply in the present circumstance. The causes of action in the two proceedings differ significantly; they are not "the same claim." Indeed, as set forth above, the Administrative Complaint relates in large part to alleged violations with respect to a "pilot wastewater treatment system" at the site that did not become fully operational until on or about June 15, 2010, approximately six weeks after the verified complaint was filed in Supreme Court. See Administrative Complaint ¶¶ 26, 35-107.

In addition, the Administrative Complaint alleges facts and violations that post-date and differ from facts and violations alleged in the verified complaint filed in Supreme Court, including: (i) separate, distinct, and different violations of effluent limits through June 13, 2012;[4] (ii) failure to submit laboratory analyses through December 2014; (iii) unlawful discharges of sewage from April 26, 2010 through September 2014; (iv) ten unlawful bypasses of wastewater treatment system components in 2011; (v) exceeding flow limits or design capacity of the wastewater treatment system twelve times between September 2010 and May 2012; (vi) failure to operate and maintain the wastewater treatment system on 27 occasions; and (vii) altering the treatment system in 2013 without written approval of the Department. See Administrative Complaint ¶¶ 156-196.

Based upon the foregoing, respondents' motion to dismiss based upon election of remedies, CPLR 3211(a)(4) and the rule against claim splitting is denied.

III. Staff's Motion to Amend the Administrative Complaint

A party "may amend its pleading at any time prior to the final decision of the commissioner," consistent with the CPLR, if permission is granted by the ALJ or the Commissioner and if there is no prejudice to the ability of any other party to respond. See 6 NYCRR § 622.5(b). CPLR 3025(a) states that a party may amend a pleading at any time by leave of court, and that "[l]eave shall be freely given upon terms as may be just."

Respondents do not argue that they will suffer prejudice in their ability to respond to the proposed amended complaint. See generally Attorney Affirmation in Reply and Opposition

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County 2007) ("The claim splitting doctrine prevents litigants from circumventing the Small Claims Court's limited jurisdiction").

[4] For example, the administrative complaint alleges that, on August 27, 2010, respondents' wastewater treatment system failed to comply with effluent limits for ammonia, BOD-5, and total suspended solids. The complaint alleges that, on June 13, 2012, the system failed to comply with effluent limits for ammonia and dissolved oxygen.

dated September 15, 2016 ("Young Aff. II"). Respondents instead argue that the proposed amendments to the complaint "do not resolve" what, in respondents' view, are fatal infirmities warranting dismissal of the initial administrative complaint. See id. ¶ 7 (proposed amended complaint "does not resolve the issue" that the Supreme Court and administrative complaints seek the same relief) and ¶ 23 ("[t]he allegations in both actions are identical in substance, involve the same parties, rely on the same facts and circumstances, and seek identical relief, the amended complaint does not resolve this issue").

As set forth above, respondents' motion to dismiss is denied. To the extent that respondents assert here those same arguments in response to Department staff's motion for leave to amend, they are not persuasive. I therefore grant Department staff's motion for leave to amend the Administrative Complaint.

Department staff is directed to serve an Amended Complaint containing the proposed additions to and deletions from the original Administrative Complaint as described in staff's motion. Respondents shall serve their answer to the Amended Complaint within 20 days of service of the Amended Complaint on respondents.

IV. Conclusion

Respondents' motion to dismiss the Administrative Complaint is DENIED.

Department staff's motion for leave to amend the Administrative Complaint is GRANTED.

__________/s/___________
D. Scott Bassinson
Administrative Law Judge

Dated: Albany, New York
April 14, 2017

APPENDIX A

Matter of C and J Enterprises, LLC and James P. Burr, Individually
Case No. R5-20160308-2200
(Deerfield Estates Mobile Home Park)

Papers Submitted with Respect to Respondents' Motion to Dismiss and Department Staff's Motion to Amend the Complaint

Respondents

1. Attorney Affirmation Motion to Dismiss, dated July 21, 2016, attaching one exhibit
2. Attorney Affirmation Appendix Motion to Dismiss, comprised of 35 exhibits

Department Staff

1. Affirmation of Scott Abrahamson: Department Staff's Opposition to Respondents' Motion to Dismiss, dated August 25, 2016, attaching one exhibit (with attachments)
2. Memorandum of Law: Department Staff's Opposition to Respondents' Motion to Dismiss, dated August 25, 2016
3. Affirmation of Morgan Costello: Department Staff's Opposition to Respondents' Motion to Dismiss, dated August 23, 2016, attaching two exhibits
4. Notice of Motion to Amend Complaint, dated August 25, 2016
5. Motion to Amend Complaint, dated August 25, 2016, attaching two exhibits

Respondents

1. Attorney Affirmation in Reply and Opposition dated September 14, 2016