

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violation of  
Article 17 of the Environmental Conservation  
Law ("ECL") of the State of New York and  
Part 613 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations  
of the State of New York  
("6 NYCRR"),

**RULING**

DEC Case No.  
R6-20131231-48

- by -

**EMPIRE CONSTRUCTION AND REAL ESTATE LLC**  
**and CHARLES CELI,**

Respondents.

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Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served the attorney of respondents Empire Construction and Real Estate LLC ("respondent Empire") and Charles Celi ("respondent Celi")(collectively "respondents") with a notice of hearing and complaint, dated November 25, 2014, alleging a violation of ECL 17-0303 and its implementing regulation, 6 NYCRR 613.9, for failure to properly close tanks permanently out of service at respondent Empire's petroleum bulk storage facility located at 217 Washington Street North, Herkimer, NY 13350. The complaint seeks an order of the Commissioner: (1) finding respondents in violation of 6 NYCRR 613.9(b); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondents to permanently close the petroleum bulk storage facility within sixty (60) days of the service of the Commissioner's order; (4) directing respondents to provide the Department with a report regarding the removal of the petroleum bulk storage tanks at the facility and permanent closure of the facility; (5) reserving all rights of the Department and the State regarding civil or criminal actions for matters not specifically alleged in this proceeding; and (6) granting such other and further relief as the Commissioner may deem just and proper.

Department staff commenced this proceeding by attempting service by mail pursuant to CPLR 312-a. CPLR 312-a(a) authorizes service "by mailing to the person or entity to be served, by first class mail, postage prepaid, a copy of the [notice of hearing and complaint], together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to sender."

Here, the notice of hearing and complaint was sent by certified mail to respondents' attorney on November 25, 2014 accompanied by two copies of a statement of service by mail and acknowledgment of receipt by mail of notice of hearing and complaint. (See Staff Exhibit 1.) The certified mail was received on November 28, 2014. (See Staff Exhibit 2.) Neither respondents nor their attorney returned the signed acknowledgment to staff within the thirty days required by CPLR 312-a(b). Department staff received the signed acknowledgment of receipt by mail from respondents' attorney on January 27, 2015 when respondents' attorney signed and dated the acknowledgement while attending the pre-hearing conference on behalf of respondents. Respondents' attorney mistakenly dated the acknowledgement January 28, 2015. (See Staff Exhibit 3.)

Department staff provided additional service by sending the notice of hearing (default) to respondents' attorney by regular mail on April 7, 2015. (See Staff Exhibits 4 and 5.) By letter dated April 13, 2015, respondents' attorney advised Department staff that she no longer represented respondents. (See Staff Exhibit 6.) Department staff provided additional service of the notice of hearing (default) to respondents by certified mail dated April 16, 2015, which was received by respondent Celi on April 23, 2015. (See Staff Exhibits 7 and 8.) In addition, Department staff attempted to serve respondent Empire with the notice of hearing (default) by serving the New York State Department of State on April 20, 2015. (See Staff Exhibit 9.) Respondents failed to file an answer to the complaint.

As noticed in the notice of hearing (default), on May 13, 2015, an adjudicatory hearing was convened before the undersigned Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services at the Department's Region 6 sub-offices, 207 Genesee Street, 14<sup>th</sup> Floor, Utica, New York 13501. The hearing commenced at 10:30 a.m. Department staff was represented by Nels G. Magnuson, assistant regional attorney, Region 6. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering a program staff witness. Noting for the record that respondent had failed to answer the complaint and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15 and offered the documentation required by 6 NYCRR 622.15(b). Department staff also sought judgment on the merits.

Department staff called one witness, Ronald Novak, PE, an engineer in the Department's Region 6 offices. In all, sixteen (16) exhibits were received in evidence.

### Discussion

In order to prevail on a motion for a default judgment or to be granted judgment on the merits, staff must first provide proof that the respondents were served with the jurisdictional papers, in this instance - the notice of hearing and complaint. Typically this is achieved by serving the notice of hearing and complaint on respondents by certified mail or personal service consistent with the CPLR as provided in 6 NYCRR 622.3(a)(3). In this proceeding, Department staff utilized CPLR 312-a, which authorizes personal service by mail. As noted above, service may be made pursuant to CPLR 312-a(a) by mailing the notice of hearing and complaint to the person or entity to be served by first class mail together with two copies of a statement of service by mail and acknowledgment of receipt and a self-addressed stamped envelope for the return of the signed acknowledgment.

Here, Department staff's service fails to obtain personal jurisdiction over the respondents. CPLR 312-a(a) authorizes service on the person or entity to be served, it does not authorize service on that person's or entity's attorney. In Jefferson Hghts. Quarry, Inc. v Fort Pike Assoc. (207 AD2d 984 [4th Dept 1994]), defendant Harmer-Hill was served pursuant to CPLR 312-a. Harmer-Hill then forwarded the summons, complaint and acknowledgement to its attorney. Defendant's attorney then signed the acknowledgement on behalf of the defendant and mailed it to plaintiff's counsel. The Appellate Division held that personal jurisdiction was obtained over defendant Harmer-Hill.

The Appellate Division in Jefferson Hghts. Quarry, Inc. v. Fort Pike Assoc. distinguished the case before it from Broman v Stern (172 AD2d 475 [2nd Dept 1991]), where the opposite occurred when the summons and complaint "were mailed to the attorney for the party to be served (cf. CPLR 312-a)." (Jefferson Hghts. Quarry, Inc. v Fort Pike Assoc., supra.) In

Broman v Stern (172 AD2d 475 [2nd Dept 1991]), the court held that personal jurisdiction was lacking. The discussion therein is instructive.

"Nothing in the CPLR authorizes service of process by mail upon the attorney for the party to be served (cf. CPLR 312-a). CPLR 308(3) permits service upon an individual to be made 'by delivering the summons within the state to the agent for service on the person to be served designated under rule 318'. However, there is no proof that the defendants-respondents ever designated their attorney as their agent for the receipt of process.

"An attorney is not automatically considered the agent of his client for the purposes of the service of process. In the absence of proof that the defendants-respondents designated their attorney as their agent for the purposes of accepting service of process, we must conclude that the attorney lacked authority to accept service on their behalf." (Id.)<sup>1</sup>

Department staff has offered no proof that respondents designated their then attorney to accept service on behalf of respondents. Although the statute and acknowledgment contemplate that an attorney can sign the form, neither authorizes an attorney to accept the mail service on behalf of the "person or entity to be served." (Compare CPLR 312-a[a] and [b].) The signed acknowledgment from the attorney does not constitute a designation, by the respondents, of their then attorney as agent for receipt of process. In Jefferson Heights Quarry v Fort Pike Associates, the attorney acknowledged, on the client's behalf, that the client received the summons and complaint service by mail.

The statement of service prepared by Department staff reads, in part, "If you are served on behalf of a corporation, unincorporated association, partnership, or other entity, you must indicate under your signature your relationship to the entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority." The acknowledgment of receipt is dated and signed by Cecilia Fagan-Polidori, Esq. and reads below her name, "Attorney for Empire Construction and Real Estate LLC and Charles Celi". As held by the court in Broman v Stern, an attorney is not automatically considered an agent of her clients

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<sup>1</sup> See also Matter of Barnes, Decision and Order of the Commissioner, 2000 NY Env LEXIS 42 (April 24, 2000) at \*2 and 19; Matter of Parent, Ruling of ALJ, 2003 NY Env LEXIS 70 (October 1, 2003) at \*2-3, finding no authorization for service of process on the respondent's attorney.

who is authorized to accept service of process on the client's behalf. As such, I conclude that Ms. Fagan-Polidori's act of signing the acknowledgement as the attorney for respondents does not constitute an indication from her or her clients of her authority to receive process.

In addition, CPLR 312-a mandates service by first class mail, not certified mail as utilized here. It has been held that this is fatal to the court's jurisdiction as service of process is only effective when it is made pursuant to the appropriate method authorized by the CPLR. (See Miron Lumber Co., Inc. v Phylco Realty Development Co., 151 Misc2d 139 [Civ Ct, Kings County 1991], citing Markoff v South Nassau Community Hospital, 61 NY2d 283, 288 [1983]; Macchia v Russo, 67 NY2d 592, 595 [1986]; Feinstein v Bergner, 43 NY2d 234, 241 [1979]; McDonald v Ames Supply Co., 22 NY2d 111, 115-116 [1968]; Frankel v Schilling, 149 AD2d 657 [2nd Dept 1989]; Cooney v East Nasaau Medical Group, 136 AD2d 392 [1st Dept 1988]; see also Buggs v Ehrnschwender and Wright, 968 F2d 1544 [2nd Cir 1992].)

I note other issues with staff's CPLR 312-a service, which are not reached due to the discussion above, including failure to demonstrate that a self-addressed stamped envelope was included in the mailing and the form provided by staff was not in substantial compliance with the statutory form.

Department staff's service of the notice of hearing (default) on respondents does not cure the jurisdictional defect.<sup>2</sup>

For the foregoing reasons, Department staff's motion for a default judgment and judgment on the merits is denied without prejudice.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
May 27, 2015

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<sup>2</sup>Once jurisdiction is obtained, service of motions, notices and other papers must comply with 6 NYCRR 622.6(a) and CPLR 2103. Service of a motion or notice of default hearing on the Secretary of State is not authorized by CPLR 2103. The Secretary of State's agency is limited to the receipt of service of process, which by definition is limited to papers served for the "purpose of acquiring jurisdiction of such limited liability company in any action or proceeding, civil or criminal, whether judicial, [or] administrative." (Limited Liability Company Law § 102[x].)

## EXHIBIT CHART

*Matter of Empire Construction and Real Estate LLC and Charles Celi, May 13, 2015 – Region 6 Sub-Office, Utica, NY*

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Cover Letter from Nels G. Magnuson, Esq. to Cecelia Fagan-Polidori, Esq., with Notice of Hearing and Complaint, all dated November 25, 2014 with Exhibits A-D.	✓	✓	Department Staff	
2	Affidavit of Service of April L. Sears, dated January 26, 2015 with certified mail receipt of November 28, 2014 delivery.	✓	✓	Department Staff	
3	Statement of Service by Mail and Acknowledgment of Receipt by Mail of Notice of Hearing and Complaint, signed January 28, 2015.	✓	✓	Department Staff	
4	Notice of Hearing (Default) dated April 7, 2015.	✓	✓	Department Staff	
5	Correspondence from Nels G. Magnuson to Cecelia Fagan-Polidori, Esq., dated April 7, 2015 (Serving the Notice of Hearing [Default]).	✓	✓	Department Staff	
6	Correspondence from Cecelia Fagan-Polidori, Esq. to Nels G. Magnuson, dated April 13, 2015.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
7	Correspondence from Nels G. Magnuson to Charles Celi and Empire Construction and Real Estate LLC, dated April 16, 2015 (Serving the Notice of Hearing [Default]) with certified mail receipt of April 23, 2015 delivery.	✓	✓	Department Staff	
8	Affidavit of Service of April L. Sears, dated April 30, 2015 with certified mail receipt of April 23, 2015 delivery.	✓	✓	Department Staff	
9	Affidavit of Service of Drew Wellette, dated April 20, 2015 of service on the New York State Department of State.	✓	✓	Department Staff	
10	Copy of Deed dated June 28, 2011 to Empire Construction and Real Estate LLC for property located at 217 Washington Street North, Herkimer, New York.	✓	✓	Department Staff	
11	NYS Department of State Entity Information, dated April 20, 2015.	✓	✓		
12	PBS Application, dated August 26, 2011.	✓	✓	Department Staff	
13	PBS Registration Certificate, issued November 11, 2011, expiration date June 16, 2016.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
14	PBS Program Facility Information Report, dated December 13, 2013.	✓	✓	Department Staff	
15	Notice of Violation dated October 2, 2013.	✓	✓	Department Staff	
16	Proposals to clean and close PBS tanks from Eggan Excavating & Equipment Co., Inc. to Charles Celi, dated October 28, 2014.	✓	✓	Department Staff	