STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 11 and 13 of the New York State Environmental Conservation Law and Parts 44 and 175 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

-- by --

ANTHONY J. REALE,

Respondent.

RULING ON MOTION FOR ORDER WITHOUT HEARING, RESPONDENT'S CROSS-MOTION TO DISMISS AND MOTION TO STRIKE OR CLARIFY AFFIRMATIVE DEFENSES

Case No. R1-20070424-260

BACKGROUND

On June 15, 2007, the Department of Environmental Conservation ("Department") issued a Notice of Intent to Revoke Permit (the "Notice") to Respondent, Anthony J. Reale ("Respondent"), effective July 6, 2007. In that Notice, Department Staff maintained that Respondent violated Environmental Conservation Law ("ECL") Section 13-0329, and Section 175.5(a)(1) ("Materially False or Inaccurate Statements") of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NCYRR"). Specifically, Department Staff contended that

> [u]pon information and belief, on or about October 13, 2006, in the State of New York, Anthony J. Reale ("Respondent" or "Respondent Reale") violated Section 13-0329 of the ECL and 175.5 of 6 NYCRR in that Respondent made materially false or inaccurate statements in Respondent's 2007 application for renewal of a New York State Department of Environmental Conservation Commercial Lobster Permit, Number 898. Specifically, Respondent falsely claimed to be a New York State resident on the NYSDEC Application for Permit Renewal – Year 2007 when Respondent Reale checked the "yes" box for New York State residency on the aforementioned application. Upon information and belief, Respondent was in fact a permanent resident of the State of Florida at the time he completed the aforementioned New York State application. The materially false or inaccurate statements in the application and supporting documentation are grounds for permit revocation pursuant to Section 175.5(a)(1) of 6 NYCRR.

Notice, at pp. 1-2. The Notice went on to state that

> During the 2007 license year, Respondent Reale violated ECL 13-0329, which states, in part, "any person domiciled within the state may take and land lobsters (Homarus americanus) from the waters of the state or land lobsters in the state taken elsewhere upon first obtaining a permit from the department." Respondent Reale is not domiciled in the State of New York but is domiciled in the State of Florida. Respondent Reale claimed January 1, 2002 as the date he last became a "permanent resident of Florida" on his Florida Department of Revenue Original Application for Ad Valorem Tax Exemption for the 2006 tax year. Respondent Reale affirmed Florida state residency on the aforementioned application with the following statement "I am a resident of the State of Florida and I own and occupy the property described above." Noncompliance with any provision of the ECL, any other State or Federal laws or regulations of the Department directly related to the permitted activity is grounds for permit revocation pursuant to Section 175.5(a)(4) of 6 NYCRR.

Notice, at p. 3. By letter dated July 5, 2007, Respondent requested a hearing, pursuant to Section 175.5(c) of 6 NYCRR.

Department Staff's October 30, 2007 statement of readiness, pursuant to Section 622.9 of 6 NYCRR, was filed with the Department's Office of Hearings and Mediation Services on November 7, 2007. The matter was assigned to administrative law judge ("ALJ") Richard R. Wissler, and on January 22, 2008, Department Staff filed a notice of motion for order without hearing. The motion, dated January 17, 2008, included a memorandum of law in support, as well as the January 16, 2008 affirmation of Megan J. Joplin, Esq. (the "Joplin Affirmation"). The Affidavits of Kim McKown, a Biologist 2 in the Crustacean Investigations Unit of the Department's Bureau of Marine Resources (the "McKown Affidavit"), and Gerard Carpenter, a Region 1 Police Investigator (the "Carpenter Affidavit"), sworn to January 16 and January 17, 2008, respectively, accompanied the motion.

On April 1, 2008, the matter was re-assigned to ALJ Mark D. Sanza. On April 7, 2008, ALJ Sanza advised the parties that he had recused himself, and that the case had been assigned to ALJ Maria E. Villa. The parties engaged in settlement discussions, which were unsuccessful, and on December 18, 2008, the ALJ issued a letter ruling addressing Respondent's motion to compel discovery, and Department Staff's motion for a protective order, which had been held in abeyance pending a possible resolution of the matter.

On January 27, 2009, the ALJ set a briefing schedule for Department Staff's motion for order without hearing, and on March 10, 2009, Respondents timely filed a combined answer to the Notice, as well as the Affirmation of J. Lee Snead, Esq. ("Combined Answer")

in opposition to the motion for order without hearing. The Combined Answer sought summary judgment in favor of Respondent based upon the analysis set forth in Respondent's second affirmative defense, which asserted that ECL Section 13-0329(1) (which deals with resident commercial lobstering licenses) was unconstitutional. Respondent asserted that "neither 'residency' nor 'domicile' status in New York is a constitutionally allowable fact to determine whether a commercial lobster license should be issued. As such, Summary Judgment as a matter of law in favor of Respondent dismissing this enforcement matter is warranted." Combined Answer, ¶ 85.

By letter dated February 2, 2009, Department Staff sought leave to reply to any arguments raised by Respondent concerning the constitutionality of ECL Section 13-0329. Leave was granted by letter dated February 6, 2009, and subsequently, on March 16, 2009, Department Staff sought leave to respond to certain other points raised in the Combined Answer. By letter dated March 18, 2009, the ALJ granted Department Staff's request, and on May 5, 2009, Department Staff filed the reply affirmation of Megan J. Joplin, Esq. (the "Joplin Reply Affirmation"), which included the Affidavit of Judy Norton, sworn to April 22, 2009 (the "Norton Affidavit"). As part of that filing, Department Staff sought clarification of certain of Respondent's affirmative defenses, or, in the alternative, that those defenses be stricken, through the Affirmation of Megan J. Joplin, Esq. ("Clarification Affirmation").

Respondent requested an extension of time to reply, which was granted on May 5, 2009. On June 8, 2009, Respondent filed the Affirmation of J. Lee Snead, Esq. ("Respondent's Reply Affirmation") in opposition to the motion to strike. On July 1, 2009, Respondent filed the June 29, 2009 Sur-Reply Affirmation of J. Lee Snead, Esq. in Opposition to the Motion to Strike (the "Sur-Reply Affirmation"). Department Staff did not object to the filing of the Sur-Reply Affirmation, which included a copy of a document obtained by Respondent as part of a request pursuant to the New York Freedom of Information Law.

For the reasons set forth below, Department Staff's motion for order without hearing is denied. Department Staff's motion to clarify or strike affirmative defenses is denied. Respondent's motion for summary judgment dismissing this enforcement matter is denied.

DISCUSSION AND RULING

Section 622.12(a) of 6 NYCRR states that in lieu of, or in addition to, a complaint, Department Staff may make a motion for an order without hearing. "A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR [New York Civil Practice Law and Rules] in favor of any party." Section 622.12(d). Department Staff bears the burden of proof on its motion for order without hearing, pursuant to Section 622.11(b)(3).

Department Staff's first cause of action alleged

> one count of making materially false or inaccurate statements on Respondent's application for renewal of a New York State Department of Environmental Conservation Commercial Lobster Permit, Number 898, in violation of 13-0329 of the ECL and Part 175 of 6 NYCRR.

Joplin Affirmation, ¶ 28. Department Staff's second cause of action alleged

> one count of non-compliance with the ECL by not being domiciled in New York State as required by the terms of his resident commercial lobster license, Permit Number 898, in violation of 13-0329 of the ECL and Part 175 of 6 NYCRR.

Id., ¶ 29.

In its motion, Department Staff requested a finding of liability, and an order revoking Respondent's resident lobster license, No. 898. Department Staff stated that it was not seeking a civil penalty, although it maintained that "any lobster obtained pursuant to permit number 898 was obtained unlawfully." Memorandum of Law, at 7-8. Department Staff noted that, as a result, there was no triable issue of fact as to any penalty amount such that the motion for order without hearing should be denied.

In order to prevail on its motion, Department Staff has the burden to show that Respondent made a materially false or inaccurate statement, within the meaning of Section 175.5(a)(1) of 6 NYCRR. That provision states that the Department may revoke licenses or permits "for a period of time it deems appropriate, after taking into consideration all relevant circumstances. The grounds for revocation include: (1) materially false or inaccurate statements in the application, supporting papers or required reports; . . .."

Section 13-0329(1) of the ECL provides that any person domiciled within the State may take and land lobsters from the waters of the State, or land lobsters in the State taken elsewhere, upon first obtaining a permit from the Department. Department Staff's motion alleged that Respondent violated that provision by making a material false statement in his application for a commercial lobster permit by checking "Yes" in answer to the question "NY Resident?" on his 2007 renewal application. Carpenter Affidavit, ¶ 6; Exhibit C. Department Staff stated that the license was issued on or about December 29, 2006 for the 2007 calendar year.[1]

[1] Pursuant to Section 13-0328(2)(b), for the period beginning January 1, 2000 through December 31, 2011, only persons who were issued a commercial lobster permit in the previous year are eligible for such permits. This is informally referred to as the "lobster license moratorium." McKown Affidavit, ¶ 6.

In its memorandum of law, Department Staff stated that after being notified by "several public individuals" that Respondent was no longer living in New York but was having another individual, Michael Ciulla, tend his traps,[2] Department Staff "conducted an investigation to determine the residency status of the Respondent." Memorandum of Law, p. 2. Department Staff concluded that Respondent is not a New York resident, and instead resides in the State of Florida. In its motion, Department Staff offered documentary evidence to show that Respondent owns real property in Florida as well as several laundry businesses in that state, and is the president of several Florida corporations. Carpenter Affidavit, ¶¶ 9, 10; Exhibits E and F. Department Staff also offered evidence that Respondent purchased a Florida Resident Saltwater Fishing License and Snook Permit. In order to obtain that permit, Department Staff alleged that Respondent presented a "Florida Landlord Certification." Id., ¶ 21; Exhibit O.

Department Staff went on to assert that Respondent does not own any real property in New York, and is not registered to vote in the State. Carpenter Affidavit, ¶ 12; Exhibit H. Department Staff noted that Respondent uses the New York address of a Robert and Theresa Whelan as his mailing address for permit renewals and correspondence with the Department. Carpenter Affidavit, ¶ 13; Exhibit I. Ms. Whelan is Respondent's niece. Id. According to Department Staff, Respondent holds a New York driver's license and a "non-resident, Florida only" driver's license, "because he has not yet surrendered his New York State driver's license." Memorandum of Law, p. 3; see Carpenter Affidavit, ¶ 7; Exhibit D. Department Staff also offered a 2006 Florida Department of Revenue Application for Ad Valorem Tax Exemption (a Florida homestead exemption) for the real property Respondent owns in Tampa, Florida. Department Staff alleged that Respondent signed the document attesting to the fact that he is a permanent Florida resident. Carpenter Affidavit, ¶ 16; Exhibit K.

In addition, Department Staff's affiant, Gerard Carpenter, stated that he had interviewed Barbara Planos, a postal carrier whose route includes the residence of Respondent's niece. Carpenter Affidavit, ¶ 17. Mr. Carpenter stated that according to Ms. Planos, Respondent lives in Florida full-time. Id. Department Staff maintained that Respondent's only ties to New York State were his driver's license and his ownership of Annie Lobster Corp., a New York corporation. Carpenter Affidavit, ¶ 14; Exhibits A and J. Consequently, Department Staff maintained that "Respondent applied for, and was granted, a resident commercial lobster permit for which he was not eligible due to his non-residency status in violation of Section 13-0329 of the ECL and Part 175.3 of 6 NYCRR." Memorandum of Law, p. 6.

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[2] After sustaining an injury in 2006, Respondent sought and obtained authorization from the Department to have Mr. Ciulla tend his traps. The authorizations include the periods from August 14, 2006 to September 12, 2006; October 2, 2006 to November 1, 2006; November 16, 2006 to December 16, 2006; and December 18, 2006 to January 17, 2007. McKown Affidavit, ¶ 11; Exhibit A; Carpenter Affidavit, ¶ 8. According to Department Staff, Respondent's correspondence to the Department during these time periods was from the State of Florida, and Respondent indicated that he would be rehabilitating from his injury there.

In his answer, Respondent affirmatively asserted that he is a resident of and a domiciliary of the State of New York, and denied that he is domiciled in Florida. Combined Answer, ¶ 2. Respondent asserted further that his residency "in either Florida or New York – is of no legal import in regard to whether he is entitled to obtain a New York State Lobster License," and maintained that he was domiciled in New York, and a resident of both New York and Florida. Combined Answer, at ¶¶ 3, 48, and 49. Respondent argued that checking "Yes" in the box on the 2007 commercial lobster permit application, which asks only whether the applicant is a resident of the State of New York, is not a material misrepresentation as to Respondent's domicile, and therefore not a violation of ECL Section 13-0329.

Respondent, in his opposition, noted that the term "domicile" is not defined in the Fish and Wildlife statutes or regulations related to obtaining a commercial lobster license. Respondent maintained that "where a statute uses the term, a factual inquiry is required, and the definition is not one ginned up by the Department." Combined Answer, ¶ 6. Respondent pointed out that other Department regulations, for example, those dealing with sporting licenses, define "domicile" as "that place where a person has his or her true, fixed and permanent home, and to which he or she intends to return even though he or she may actually reside elsewhere." 6 NYCRR Section 177.1(c). Respondent went on to observe that none of the documents Department Staff provided establish that Respondent is a domiciliary of the State of Florida, rather than the State of New York, nor did Department Staff ever state that Respondent is a Florida domiciliary.

Respondent contended that in many instances, the affidavits provided by Department Staff were hearsay or double hearsay evidence, that Department Staff had failed to authenticate the documentary evidence provided, or had drawn conclusions from that evidence that were without foundation.

In his opposition, Respondent noted that he produced a valid New York State driver's license in order to obtain his lobstering license, and cited to the instructions provided for applicants entitled "Proof of Domicile or Residence," which states that a valid State driver's license is an acceptable proof of residency or domicile. Combined Answer, Exhibit 4. Respondent noted that he possesses no other resident driver's license for any other state, and that from 1998 through 2006, he lobstered in New York State, except for the period in 2006 when, due to an injury, he received permission from the Department for Mr. Ciulla to tend his traps. According to Respondent, he is the president of Annie Lobster Corp., a New York corporation that has filed corporate tax returns for the years 2000 through 2008, and maintains a bank account in New York State. Respondent argued that Department Staff admitted that he "went through the effort to ensure that his lobster gear could be tended on behalf of his Company by seeking and obtaining Medical waivers from the Department during the period June 2006 through January 2007." Combined Answer, ¶ 64(B).

Respondent went on to assert that he "routinely returns to New York State for months to conduct business, and when he does so, he stays at 3 Overlook Drive, Mount Sinai," his niece's home, "which has approximately 7 bedrooms, many of which are not normally in use

and one of which is always available to him." Combined Answer, ¶ 15. Respondent admitted that this residence is owned by his niece, and stated further that she allows her relatives to live there when they are in New York. As to Mr. Carpenter's conversations with Ms. Planos, the postal carrier, Respondent pointed out that at the time of those conversations (March, 2007) he had been recuperating from his injury, and that as a result, "the context of the statement regarding Respondent living in Florida 'full time' cannot be determined." Combined Answer, ¶ 64(C)(1). Respondent noted that the postal carrier stated that she had known Respondent for over ten years and that mail was addressed to him at 3 Overlook Drive, and sometimes was delivered certified, and argued that this suggested "the continued maintenance of significant contacts by Respondent." Combined Answer, ¶ 64(C)(3).

Respondent went on to point out that his ownership of corporations which own laundromats in Florida does not establish domicile, because "if it did, Respondent's ownership of Annie Lobster Corp. would conclusively establish domicile in New York." Combined Answer, ¶ 65(A). As to Respondent's registering a car in New York, he asserted that it is common for states to require vehicle registration if an individual maintains a residence in the state, as is the case in New York. Respondent stated that he was not registered to vote in Florida, and noted that "the fact that a person does not vote in New York is not proof of any kind that the person is not a New York domiciliary." Combined Answer, ¶ 65(C).

As to his ownership of real property in Florida, having sold his property in New York, Respondent maintained that it is "beyond serious argument that a person residing within the State of New York, by simple reason that he or she owns real property outside of the State, does not forfeit their New York 'domicile.'" Combined Answer, ¶ 66. Respondent argued that a person may have two residences, in or out of the State. Id., ¶ 67. In addition, Respondent noted that the Florida fishing license, which Department Staff indicated was a resident license, in fact were issued to Respondent as a non-resident. Combined Answer, ¶ 63(C); Carpenter Affidavit, Exhibit O.

Respondent pointed out that the lobster license application asks whether an applicant is a "resident" of the State, and that even if he were a domiciliary of Florida, he was not asked where he is domiciled, and "as a layman, he cannot be expected to understand the legalities of 'domicile,' a legal determination that Courts are at great pains to specifically define." Combined Answer, ¶ 68. Noting that one of the documents required to show proof of residency (and only one document is required) is a valid New York State driver's license, Respondent emphasized that Department Staff did not allege that he failed to provide such proof, or "submitted some other false document" as proof. Combined Answer, ¶ 69. The document in question indicates that

> [i]n order to demonstrate sufficient documentation of residence or domicile in New York State, applicants must provide one of the following as proof of residency or domicile (photocopies are acceptable):

> **a New York State Motor vehicle driver's license OR New York State motor vehicle non-driver's ID**
>
> ***Proof of identity and New York residence must show signature and current address. The preferred proof of identity/address will be a valid New York State driver's license or a non-driver ID issued by New York State Department of Motor Vehicles.**

Combined Answer, ¶ 71; Exhibit 4 (bold and underline in original). The document goes on to state that "[t]o qualify for a resident license, a person must live in New York State prior to the date of application. Land ownership in New York does not make you a resident. Residency is that place where a person maintains a fixed, permanent and principal home (regardless of where temporarily located), such as where a person is registered to vote." Combined Answer, ¶ 72; Exhibit 4. In addition, the document states that "[a]pplicants for New York State resident Marine Resource Permits must maintain a fixed, permanent and principal home or establishment in New York." Combined Answer, ¶ 71; Exhibit 4 (underline in original). Respondent maintained that the fact that he did not own real property in New York was of no consequence, and was insufficient to establish Department Staff's entitlement to judgment on its motion. Respondent concluded that because he was asked only whether he was a resident of the State, Department Staff could not establish that he made a materially false or inaccurate statement on his application. Furthermore, Respondent contended that

> as the Department provided Respondent and others with guidance on that issue, which identified New York as being either his "domicile or residence," and provided him with guidance on what qualified as proof of new [sic] York residence – a New York State DMV driver's license, which admittedly he produced – the Department cannot now be heard to suggest that his following of their directives and guidance should work to strip him of his valuable and quasi-property right to earn a living as a lobsterman.

Combined Answer, ¶ 81 (emphasis in original).

Respondent noted that the Homestead Exemption application, which Department Staff alleged established that Respondent was a permanent resident of Florida, was unsigned and therefore "proof of nothing more than an application was made by someone and was ultimately granted." Combined Answer, ¶ 74; Carpenter Affidavit, ¶ 16 and Exhibit K. Department Staff provided a copy of an electronic signature that is maintained on file in the Appraiser's Office, which, Respondent asserted is "on whatever other documents are kept by the Florida Appraiser's Office." Combined Answer, ¶ 75. Moreover, Respondent cited to cases holding that a New York resident's obtaining a homestead exemption in Florida is not determinative of that person's "primary residence." See 310 East 23rd LLC v. Colvin, 41

A.D.3d 149, 149 (1st Dept. 2007) (documentary evidence does not necessarily preponderate over inconsistent testimonial evidence; specification of primary residence in tax-related documents not dispositive); Glenbriar Co. v. Lipsman, 2002 WL 1363398, * 1 (N.Y. Sup. App. Term 2002), aff'd, 11 A.D.2d 352, (1st Dept. 2004), aff'd, 5 N.Y.3d 388, 392-93 (2005) (address as designated on tax return is merely one of many factors; husband's listing of Florida residence as primary residence on tax returns not fatal to couple's claim of primary residence in New York); 111 Realty Co. v. Sulkowska, 21 Misc.3d 53, 53 (N.Y. Sup. Appellate Term 2008) (notwithstanding designation of Florida address in applying for Homestead Exemption, designation, while one of many factors to be considered in determining primary residence, is not dispositive as a matter of law, especially in the context of a motion for summary judgment).

Respondent also raised constitutional objections to the lobstering license statute, citing to the court's decision in Connecticut ex rel. Blumenthal v. Cahill, Memorandum Decision and Order, 98-CV-575, 99-CV-718 (FJS/DRH) (N.D.N.Y., Feb. 2, 2001). In that case, the U.S. District Court for the Northern District of New York considered a constitutional challenge to ECL Section 13-0329(a)(2). That provision states that

> [a] person not domiciled within the state but who is domiciled in a state that provides reciprocal permits or licenses to persons domiciled in New York state may, upon first obtaining a permit from the department, take and land lobsters only from the waters of the state westerly and southerly of a straight line drawn from the Flashing Green Light Number 9 Whistle Buoy at Cerebus Shoals (located approximately seven miles northwesterly to Montauk Point) northwesterly to Race Rock and thence due north to the New York-Connecticut interstate boundary line; and may land lobsters taken outside New York state waters.

Thus, under the statute, lobstermen domiciled in New York State, and those domiciled in states, including Connecticut, that provided reciprocal permits or licenses to New York domiciliaries, could obtain commercial lobstering permits. Nevertheless, a non-domiciliary permittee was not permitted to take lobsters from a designated area of New York waters in Long Island Sound near Fishers Island (the "Restricted Area").[3]

The District Court granted summary judgment in favor of the State of Connecticut, and a private litigant, Vivian I. Volovar, holding that

[3] "Fishers Island lies between Block Island Sound and Long Island Sound near the eastern Connecticut coastline, but is part of the State of New York. The record suggests that the Restricted Area provides an exceptionally fertile lobster bed. On this record, it appears the Nonresident Lobster Law, which has been in effect in its current form since 1964, was continually enforced without challenge until 1997." Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 89 (2d Cir. 2003) (footnote omitted).

> [s]ection 13-0329(2)(a) clearly discriminates against interstate commerce on its face. By its very terms, this statute forbids non-resident commercial lobstermen[4] who hold valid New York non-resident lobstering permits from lobstering in the restricted area while permitting New York resident commercial lobstermen to lobster in the same area. Thus, § 13-0329(2)(a) impermissibly hoards a natural resource for the benefit of New York citizens, thereby impeding interstate commerce in the lobstering trade.

Memorandum Decision and Order, p. 14-15 (footnote omitted). The District Court went on to hold that the statute also violated the Privileges and Immunities Clause, as well as the Equal Protection Clause, of the United States Constitution. Id. at 24, 26 and 32. The court enjoined the further enforcement of the discriminatory provisions of Section 13-0329(2)(a). Id. at 18, 24, 26 and 32.

On appeal, the Second Circuit affirmed the lower court in part, holding that the statute violated the Privileges and Immunities Clause, but reversed that portion of the lower court's decision that declined to afford qualified immunity from liability to state officials enforcing the statute. Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 93 (2d Cir. 2003). The court held that "the Nonresident Lobster Law, on its face and as applied, violates the Privileges and Immunities Clause of the United States Constitution." Id. The appellate court's finding that the statute violated the Privileges and Immunities Clause obviated the need to address the State of Connecticut's Commerce Clause challenge. Id.

In affirming the lower court, the appellate court stated that "[t]he Nonresident Lobster Law discriminates against nonresident commercial lobstermen (such as Appellee Volovar) by preventing them from pursuing their livelihoods in the Restricted Area." 346 F.3d at 95. The court reasoned that

> [w]hile the Nonresident Lobster Law does not impose an absolute bar to commercial lobstering by nonresidents in New York's waters, a wholesale bar has never been required in order to implicate the Privileges and Immunities Clause. . .. Insofar as the first prong of Privileges and Immunities analysis is concerned, it suffices that the Nonresident Lobster Law discriminates against nonresidents with respect to the privileges and immunities New York accords to its own citizens to engage in commercial lobstering within a specific geographic region of New York – the Restricted Area.

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[4] In its decision, the court noted that it had been advised at oral argument by counsel that women involved in commercial lobstering prefer to be called "lobstermen." Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 89, fn. 4 (2d Cir. 2003).

Id. at 95-96. The Second Circuit analyzed the parties' arguments with respect to the second prong of the analysis, and concluded that

> [a]ccordingly, we find the Nonresident Lobster Law violates the Privileges and Immunities Clause of Article IV and is unconstitutional as applied to nonresident commercial lobstermen. Additionally, in light of the unqualified and unjustifiable exclusion of *all* nonresident commercial lobstermen from obtaining a permit to lobster in the Restricted Area, we are unable to foresee any circumstances under which this statute avoids a constitutional reckoning with the Privileges and Immunities Clause.

Id. at 100 (emphasis in original; footnote omitted).

In light of these holdings, Respondent took the position that

> as a result of the determination in the *State of Connecticut* case the provisions of the Nonresident Lobster Law (E.C.L. § 13-0329(2)(a)) were found unconstitutional, and that the remaining portion (the Resident Lobster Law -- § 13-0329(1)) is also facially unconstitutional, at least until such time as the State Legislature enacts a constitutionally adequate law allowing for the licensure of non-resident/non-domiciliary lobstermen. This has never been done. As such, the residency or domicile – vel non – of any person applying for a commercial lobster permit is not a question that can constitutionally be asked by the State in regard to obtaining such a permit under existing New York law.

Combined Answer, ¶ 22.

In further support of his argument on this point, Respondent cited to legislation introduced in 1999 to amend the provisions of the ECL dealing with shellfishing. Respondent pointed out that the legislative history associated with that bill contained a number of statements that, in light of judicial determinations that residency requirements, absent provisions for licensing non-residents, violate the Equal Protection and Privileges and Immunities Clauses of the United States Constitution, the law must be amended to remove the residency requirement. See N.Y. Bill Jacket, Laws of 1999, Ch. 327; 1999 Bill Jacket, Assembly Bill 8169; Statement of Senate Sponsor Owen Johnson, at 4; Statement of Hon. Kevin Cahill, Member of the Assembly, at 6; Memorandum in Support, at 8. Respondent concluded that

> whether a person is a "resident" or "domiciliary" cannot be a material issue in regard to obtaining a commercial lobster license under E.C.L. § 13-0329 in its present form and, therefore, even if

> Respondent is found to be non-resident, the representation that he was a "resident" of the New York is not a "materially false or inaccurate statement" under 6 N.Y.C.R.R. § 175.5(a)(1), nor it is a violation of "any provision of the ECL" under § 175.5(a)(4), because "residency" is not a requirement that presently may be asserted as a condition of commercial lobster licensure under E.C.L. § 13-0329.

Combined Answer, ¶ 47.

The Joplin Reply Affirmation countered that Respondent failed to raise an issue of fact sufficient to defeat the Department's motion, because Respondent offered no facts to support his contention that he is domiciled in New York State. According to the Joplin Reply Affirmation,

> [t]he Respondent's only ties to New York are a driver's license that was issued prior to his departure for Florida, the lobster license that is at issue in this matter, as president of a New York corporation that deals with the Respondent's lobster business, and brief interludes at a house owned by a relative.

Joplin Reply Affirmation, ¶ 11.

Department Staff asserted that "all the evidence indicates that the Respondent has changed his domicile from New York to Florida." Joplin Affirmation, ¶ 25. According to Department Staff, "Respondent is gaining greatly by claiming to be a domiciliary of two separate states: the ability to harvest a valuable resource, lobster, from the waters of New York State as well as the tax benefits he receives in the State of Florida, among other benefits. Additionally, if he should lose his license, due to the moratorium, it could be several years before he would be eligible for a new one." Joplin Affirmation, ¶ 27. With respect to Respondent's claim that the distinction between "residence" and "domicile" would not be within the scope of a layman's knowledge, Department Staff argued that knowledge is not an element of the violation, and moreover, that ignorance of the law is not a valid defense.

Department Staff characterized as "absurd" Respondent's claim that the signature on file with the Florida Assessor's Office does not establish that he signed the Homestead Exemption Application. Joplin Affirmation, ¶ 36. In this regard, Department Staff offered the Affidavit of Judy Norton, Senior Supervisor in the Exemptions Department of the Hillsborough County Property Appraiser's Office, sworn to April 22, 2009 (the "Norton Affidavit"). According to the Norton Affidavit, Respondent applied for the Homestead Exemption on December 1, 2005, stating that his Florida address was his primary residence as of January 1, 2006, and that he was a permanent resident of the State of Florida. Department Staff also asserted that Respondent has not paid any New York State income tax for the years 2006 and 2007, but did not offer any evidence to support this statement, beyond

the affirmation of counsel. Joplin Reply Affirmation, ¶ 43. Finally, Department Staff contended that the cases cited by Respondent in support of his claim that his signature on the Homestead Exemption was not dispositive on the issue of domicile were distinguishable from the facts in this proceeding.

As part of its motion to strike or clarify affirmative defenses, Department Staff argued that the only portion of the statute that was held to be unconstitutional by the Second Circuit was that portion that prohibited non-residents from lobstering in the Restricted Area. Department Staff stated that in the wake of the Court's decision, the Department does not enforce that portion of the statute, and that those who held non-resident lobster licenses continue to hold such permits. Department Staff went on to contend that, in any event, Section 13-0329(2)(a) is not at issue. "The Respondent holds a resident commercial lobster permit, not a non-resident commercial lobster permit." Clarification Affirmation, ¶ 26.

In his Sur-Reply Affirmation, Respondent offered an additional document, a letter dated November 25, 1997 from Gordon Colvin, the Department's Director of Marine Resources, to David Denison, President of the Fishers Island Lobsterman's Association (the "Colvin Letter"). Respondent indicated that the document had just been received pursuant to Respondent's request under the New York Freedom of Information Law. The letter stated that

> [w]e have been concerned for a number of years that residency and domicile requirements and durational residency/domicile requirements for commercial licenses and permits may be invalid under the equal protection and privileges and immunities clauses of the United States Constitution. . . . ECL Section 13-0329(2)(a) denies persons not domiciled in New York the right to fish for lobsters in waters around Fishers Island. It denies to non-domiciliaries the right to pursue their livelihood, a constitutionally protected privilege. . . . Continuing to apply and enforce this law would inevitably lead to litigation attacking its validity and exposing the citizens of the State to the considerable expense of compensatory damages and attorneys' fees.

Sur-Reply Affirmation, Exhibit A, p. 2. Respondent took issue with the Department's position that "the only thing determined after the Connecticut v. Crotty case was that the territorial limitation aspect of E.C.L. § 13-0329(2)(a) was at issue and that it was this provision that was barred from enforcement." Id., ¶ 5. According to Respondent, neither the trial court nor the appellate court's decisions supported Department Staff's argument that the holdings in those cases should be interpreted so narrowly.

Respondent's arguments as to the constitutionality of the statute need not be addressed at this stage. Respondent's citations to the legislative history of the amendments to the shellfishing statute are unavailing, because in each instance, the text of that history indicated that residency requirements, *absent provisions for licensure of non-residents*, were

constitutionally infirm. The Second Circuit did not hold that the portion of the statute (ECL Section 13-0329(2)(b)) that provides for a higher fee for non-residents was unconstitutional. Similarly, the Colvin Letter is directed to the restriction on non-resident licensees to lobster in the Restricted Area. Respondent's argument that because Section 13-1329(2)(a) was determined to be unconstitutional, and therefore, by extension, the statutory scheme that distinguishes between resident and non-resident licensees must also fail, is not supported by the rationale articulated in the Second Circuit's decision. The Second Circuit did not address Section 13-0329(2)(b), which sets forth the fee for a non-resident lobstering permit. That section is still in effect, and requires non-residents to pay a higher fee than residents to obtain a lobstering permit.

Furthermore, Respondent's reading of the Second Circuit's decision is too expansive. The unconstitutionality of ECL Section 13-0329(2)(a) cannot be construed to render Section 13-0329(1) invalid, because the Second Circuit did not address the latter provision. Under the circumstances, it is reasonable to conclude, as Department Staff argues, that the geographical limitation on non-resident lobstering in the Restricted Area, rather than the general distinction between resident and non-resident licensing requirements, is the basis for the Second Circuit's holding. In any event, depending upon the outcome of the hearing, Respondent's arguments on this point could be rendered academic, and there is therefore no need to resolve this question until a factual record is developed.

Respondent's Reply Affirmation included a February 26, 2009 decision of the Suffolk County Court in People v. Anthony Reale, Case No. 1729-2008. In that case, the court dismissed, for insufficient evidence, coupled with erroneous legal instructions, an indictment charging Respondent Reale with offering a false instrument for filing in the first degree, in violation of Section 175.35 of the New York State Penal Law. The court evaluated the claim that Respondent Reale was not a "resident" of New York State, within the meaning of ECL Section 13-0329, in obtaining a license to take lobsters. Concluding that "the question of whether the Defendant was domiciled in New York when he filed the application is critical to this prosecution," the court noted that "[h]ere, the prosecutor clouded the legal issue by using the term 'residence.' Under the law a person may have more than one legal residence, but only one domicile." Decision, at 2. The court went on to observe that while the documents introduced by the prosecution (the applications for a lobster license and for the Florida Homestead Exemption) had been authenticated as public records, "those authentications did not address the essential question of whether the documents the prosecution introduced and contends were inconsistent were both filed by the Defendant." Id.

Respondent's Reply Affirmation stated that the District Attorney did not appeal, or present the case to the grand jury a second time, as authorized in the court's order, and that the motion to re-argue was denied. Respondent's Reply Affirmation, ¶ 5. According to the Sur-Reply Affirmation, the time to appeal the Decision has expired, "and the subsequent denial of the motion to reargue is all but foreclosed from appeal insofar as it is wholly discretionary with the District Court." Sur-Reply Affirmation, ¶ 13. Respondent argued that, as a result, "Department Staff's proffer of documents to 'prove' residency or domicile is legally insufficient and – to this proceeding, now a matter of *res judicata*." Respondent's

Reply Affirmation, ¶ 6. In the Sur-Reply Affirmation, Respondent reiterated its argument that the County Court's decision should be given preclusive effect. According to Respondent,

> [t]he matters determined in the Court's order were against the same defendant on the same allegation of fact as is asserted here – that the mere affidavit of someone in Florida can suffice to prove that the Respondent actually signed and presented the affidavit in Florida establishing his 'permanent residency' there. The issues, parties, and legal theories presented both here and before the District Court on this legal issue are identical and 'the thing has been adjudicated' as between the parties.

Sur-Reply Affirmation, ¶ 11 (footnote omitted). Respondent went on to maintain that "[n]otwithstanding whether strict *res judicata* applies," a court of competent jurisdiction had spoken to the issue and therefore as a matter of law that determination was binding in this proceeding, "especially where the central issue in question is whether the ALJ must hold an evidentiary hearing to determine on all the facts whether the Respondent is or is not a 'domiciliary,' or is or is not a 'resident' of the state of New York." Id., ¶ 12.

The Decision's applicability to this proceeding is limited. Even if Respondent had been acquitted after a trial, "[a]dministrative discipline may be imposed although a criminal proceeding arising out of the same incident has been dismissed or there has been an acquittal." Reed v. State, 78 N.Y.2d 1, 8 (1991) (citations omitted). In Reed, the Court of Appeals held that a claimant, who sought compensatory damages from the State under the Unjust Conviction and Imprisonment Act, and whose conviction for first-degree manslaughter was reversed, failed to make the necessary showing that she was likely to succeed at trial in proving that she did not commit any of the acts charged, or that her acts did not constitute crimes. The Court pointed out that "[a]n acquittal is not equivalent to a finding of innocence," and in a subsequent civil proceeding, involving a lower standard of proof than beyond a reasonable doubt, it is not necessarily dispositive. Id. (citations omitted). In this case, Respondent was not acquitted after a trial. Rather, the indictment was dismissed for insufficient evidence. While the Suffolk County Supreme Court's reasoning lends further support to the conclusion that Respondent's domicile is the focus of the statute, rather than his residence, the County Court's dismissal has no preclusive effect in the context of this proceeding.

As Respondent points out, Department Staff has the burden of establishing that Respondent is not domiciled in the State of New York. As noted above, the instructions for applicants for a resident lobster license refers, in several instances, to "residence *or* domicile." Combined Answer, Exhibit 4 (emphasis supplied). Nevertheless, Section 13-0329(1) refers to the requirements that "any person *domiciled* within the state" (emphasis supplied) must satisfy in order to obtain a permit to take or land lobsters. Accordingly, in order to prove that Respondent made a material misrepresentation on his renewal application for a lobstering license, Department Staff must make a *prima facie* showing that Respondent

is not a New York domiciliary. The proof offered by Department Staff on the motion with respect to Respondent's residence in New York State or Florida may be probative on the issue of Respondent's domicile, but that proof is insufficient to meet Department Staff's burden on a motion for summary relief. This is especially true given the instructions for applicants, which appears to use the terms "residence" and "domicile" interchangeably. Under the circumstances, a determination as to whether Respondent made a *material* representation cannot be made based on the submissions on the motion.

The determination of domicile is fact intensive. See Matter of Newcomb's Estate, 192 N.Y. 238, 250 (1908) (person may have two places of residence, but only one domicile; question is one of fact rather than law); Matter of Brunner, 41 N.Y.2d 917, 918 (1977) (question is generally a mixed question of fact and law); Matter of Urdang, 194 A.D.2d 615, 615 (2nd Dept. 1993) (burden is on party seeking to establish change of domicile; question is one of mixed fact and law); Cohen v. Cohen, 1993 WL 364578, * 5 (Sup. Ct., Kings Cty. 1993).

Department Staff's motion does not establish its entitlement to summary relief. Even assuming, for the sake of argument, that the terms "resident" and "domicile" are equivalent for purposes of establishing the violations alleged, the proof offered is contradictory and there are facts in dispute with respect to this issue. Respondent holds a New York State driver's license and a non-resident Florida driver's license. Although Department Staff provided documentation that Respondent is not registered to vote in Suffolk County, no proof that Respondent is registered to vote in any other state was provided. Department Staff contended that Respondent obtained a Resident Saltwater Fishing License and Snook Permit, by providing a Florida Landlord Certificate as proof of residency. A review of the certified copy of that document, however, indicates "Nonresident" in the "Resident Indicator" field under the "General Information" heading. Carpenter Affidavit, ¶ 21; Exhibit O. The fact that he obtained a Homestead Exemption is not sufficient to meet Department Staff's burden on a motion for order without hearing.

Nevertheless, Respondent's arguments in opposition to the motion, and Respondent's assertions in support of his motion for summary judgment dismissing the enforcement action,[5] do not establish that Respondent is domiciled in New York. For example, Respondent did not provide an affidavit, sworn to by Respondent, declaring that he is domiciled in New York and intends to return to the State. Rather, the Combined Answer states that "[u]pon confirmation by your affirmant [Respondent's counsel] with the Respondent, Respondent intends to return at some point to the State of New York as his formal permanent address." Combined Answer, ¶ 16. Respondent did not provide any additional documentation beyond that offered by Department Staff with respect to Respondent's domicile. For example, no copies of New York or Florida income tax returns

[5] Paragraph 85 of the Combined Answer stated that "[f]inally, based on the analysis provided in the Second Affirmative Defense, the patent unconstitutionality of E.C.L. § 13-0329(1) bars this enforcement hearing inasmuch as neither 'residency' nor 'domicile' status in New York is a constitutionally allowable fact to determine whether a commercial lobster license should be issued. As such, Summary Judgment as a matter of law in favor or Respondent dismissing this enforcement matter is warranted."

were provided, either by Respondent or by Department Staff, to support or rebut Respondent's claims in this regard. Under the circumstances, a hearing should be held, and testimony elicited, to resolve this issue. Department Staff's motion for an order without hearing, and Respondent's cross-motion to dismiss, are denied.

Department Staff's Motion for Clarification of Affirmative Defenses/Motion to Strike

In its reply, Department Staff moved to strike Respondent's four affirmative defenses, pursuant to Section 622.4(f), or, in the alternative, for clarification of those defenses. Section 622.4(c) requires that a respondent's answer "explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted." Department Staff moved to strike Respondent's first affirmative defense, which stated that Department Staff failed to state a valid cause of action.

In support of this defense, Respondent contended that "Respondent's residency – in either Florida or New York – is of no legal import in regard to whether he is entitled to obtain a New York State Lobster License." Combined Answer, ¶ 3. Department Staff stated that "in order to hold a resident commercial lobster permit in the state of New York, you must be a legal permanent resident of the State" and contended further that "[t]he fact that the Notice uses the term "resident" is of no legal consequence to the validity of the cause of action." Clarification Affirmation, ¶¶ 11-12. According to Department Staff, "[u]nder New York law, the term 'permanent resident' means domiciliary." Id., ¶ 13. Respondent took issue with this claim, noting that the cases cited simply state the general rule that a person's domicile is that principal and permanent place of residence to which they always intend to return from wherever they may be temporarily located. See Laufer v. Hauge, 140 A.D.2d 671, 672 (2nd Dept. 1988), lv. denied, 72 N.Y.2d 1041 (1988); Rosenzweig v. Glen's Truck Serv., Inc., 136 A.D.2d 689 (2nd Dept. 1988) (factual dispute created by parties' submissions on the question of domicile; consequently, denial of summary judgment appropriate).

The Appellate Division Second Department recently adopted the view of the First and Third Departments, that a motion to strike such an affirmative defense should be denied. Butler v. Catinella, 58 A.D.3d 145, 150 (2nd Dept. 2008) (agreeing that the defense, as pled, is "harmless surplusage," and that no motion by the plaintiff lies "as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim"). Department Staff's motion to strike the first affirmative defense is denied.

Respondent's second affirmative defense incorporates the constitutional arguments discussed above. Because this ruling concludes that this dispute need not be resolved at this stage of the proceeding, and may be rendered academic depending upon the facts elicited at the hearing, Department Staff's motion to strike is denied.

The third affirmative defense states that "[f]or reasons identified above, as provided herein, Respondent is a resident of the State of New York, notwithstanding that he is also a resident of the State of Florida." Combined Answer, ¶ 48. Department Staff maintained that this defense should be stricken, because it "fails to meet the Respondent's burden of proof

and fails to place Department staff on notice of any facts or legal theory on which it is based." Joplin Reply Affirmation, ¶ 28. Department Staff went on to argue that this defense is irrelevant to Respondent's liability. Department Staff acknowledged that an individual may have multiple residences, but only one domicile, and cited to the language of Section 13-0329(1), which refers only to an applicant's domicile, not his or her residence.

Because the status of Respondent's "residence" is probative on the question of domicile, as well as Department Staff's cause of action with respect to Respondent's allegedly false statement on his lobstering permit application, this affirmative defense is proper. Respondent is entitled to offer evidence on this point, and therefore, Department Staff's motion to strike the third affirmative defense is denied.

The fourth affirmative defense states that "[f]or reasons identified above, and as provided herein, Respondent is a domiciliary of the State of New York." Combined Answer, ¶ 49. Department Staff objected to this affirmative defense, arguing that the defense did not include any factual or legal support for this general allegation, and therefore failed to place Department Staff on notice of the facts or legal theory on which it is based.

This argument is unpersuasive, in light of the contentions in Respondent's Combined Answer, as well as Respondent's Reply Affirmation, which contained an extensive discussion of the facts and legal theories that form the basis of Respondent's assertions with respect to his domicile. Respondent's fourth affirmative defense, that he is a domiciliary of the State of New York, is proper. A hearing will be held to elicit facts and argument on this point.

Moreover, both the third and fourth affirmative defenses are more in the nature of denials than affirmative defenses. See Matter of Greenman, ALJ Ruling, 1997 WL 33136580, * 2 (1997) (noting that an affirmative defense is defined as new matter, which, assuming that the allegations in the complaint are assumed to be true, would constitute a defense to those allegations); Beece v. Guardian Life Ins. Co., 110 A.D.2d 865, 866 (2nd Dept. 1985) (burden of proof does not shift merely because answer characterizes a denial as an affirmative defense). In this case, even if Respondent's affirmative defenses are more properly considered to be denials, there is no basis for dismissal on that ground. Matter of Greenman, supra. Department Staff's motion to strike this defense is denied.

FACTS

Pursuant to Section 622.12(e), the facts that have been determined in this ruling on Department Staff's motion for order without hearing are as follows:

1. Respondent, Anthony J. Reale, applied for a commercial lobstering permit, No. 898.

2. Respondent is the President of Annie Lobster Corp., a New York corporation.

3. Respondent holds a valid New York State driver's license, and a Florida non-resident driver's license.

4. After sustaining an injury in 2006, Respondent sought and obtained authorization from the Department to have Mr. Ciulla tend his traps. The authorizations included the periods from August 14, 2006 to September 12, 2006; October 2, 2006 to November 1, 2006; November 16, 2006 to December 16, 2006; and December 18, 2006 to January 17, 2007.

CONCLUSION

The motion for order without hearing is denied. Department Staff's motion to clarify affirmative defenses, or, in the alternative, to strike those defenses, is denied. Respondent's motion for summary judgment dismissing this enforcement matter is denied.

On or before Friday, August 21, 2009, the parties are to advise me of their availability for a conference call during the week of August 24-28, 2009, to discuss hearing dates.

_____/s/_____
Maria E. Villa
Administrative Law Judge

Dated: August 13, 2009