STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
----------X
In the Matter of the Alleged Violations of Article 25 of the New York State Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

Ruling on Staff's Motion for Order Without Hearing

DEC File No. R2-20060113-15

-by-

GIUSEPPE ROCCO, ROSE ROCCO, SANO CONSTRUCTION CORP. and MALBA ASSOCIATION,

Respondents.

Site: 143-08 Malba Drive, Flushing, New York 11357
Queens County Tax Block 4416, Lot 239 and Lot 18
----------X

Summary of Ruling

The New York State Department of Environmental Conservation (DEC or Department) staff's motion for order without hearing dated April 19, 2006 is denied and the staff is directed to file a Statement of Readiness with the Office of Hearings and Mediation Services (OHMS) pursuant to § 622.9 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) when it wishes to proceed to an adjudicatory hearing.

Proceedings

The Department staff commenced this proceeding against respondents Giuseppe Rocco, Rose Rocco, and Sano Construction Corp. by service of the notice of motion and motion for order without hearing dated April 19, 2006 along with supporting papers: memorandum of law in support of motion for an order without hearing with attachments and affidavit of DEC Marine Biologist I Andrew Walker dated April 19, 2006 with Exhibits A-J. Staff's motion alleges that in violation of Article 25 of the Environmental Conservation Law (ECL) and Part 661 of 6 NYCRR, the respondents performed work at 143-08 Malba Drive, Flushing, New York, in the adjacent area of Powell's Cove, tidal wetland no. 598-516 without a permit. Staff alleges that this work consisted of the removal of vegetation and construction of a seawall. Mr. Walker states in his affidavit that Giuseppe Rocco and his wife Rose Rocco own the property at this location and Sano

Construction Corp. performed the actual construction. In addition, Mr. Walker explains that Malba Association is listed as the owner of record of a portion of the involved site and it is on this basis that this entity is named in staff's motion as a respondent. Malba Association has commenced a lawsuit against the Roccos claiming that the seawall was constructed on its property without its consent. Against respondents Rocco and Sano Construction Corp., staff seeks a penalty of no less than $20,000, removal of the fill and seawall and restoration of the adjacent area. With respect to respondent Malba Association, staff seeks an order requiring this respondent to grant access onto the portions of the subject property that it owns in order that restoration may be conducted.

The OHMS received staff's motion papers on April 27, 2006. On May 3, 2006, on behalf of Malba Association, Richard Ware Levitt, Esq. submitted a letter to Chief Judge James T. McClymonds in response to the staff's motion for order without hearing stating its consent to staff's request for relief - specifically, the removal of the seawall and restoration of the adjacent area on property of which Malba Association claims ownership. On May 9, 2006, by facsimile, Luigi Brandimarte, Esq. sent a letter to Chief Judge McClymonds on behalf of respondents Rocco and Sano Construction Corp. requesting that his clients be given until June 6, 2006 to respond to the staff's motion. Staff consented and the Chief Judge granted this extension.

The OHMS received the response of respondents Rocco and Sano Construction Corp. on June 7, 2006. These papers contained the affirmation of Luigi Brandimarte dated May 24, 2006; the affidavit of Stephen M. Gross, an environmental consultant and principal of Hudson Highlands Environmental Consulting dated May 22, 2006 with attachments; a letter dated May 24, 2006 from Aimee Petkus, environmental scientist of Ethan C. Eldon Associates, Inc. with attachments; and the Verified Answer of defendants Giuseppe Rocco and Rose Rocco in Malba Association v. Rocco and Rocco, Index No. 8816/2006 (Supreme Court, Queens County). In their responsive papers, Giuseppe Rocco, Rose Rocco, and Sano Construction Corp. maintain that the Department does not have jurisdiction over the work in question because according to Mr. Gross, "the boundary of the regulated tidal wetlands is defined by a rip-rap seawall, which is both functional and substantial, exceeds one hundred (100) feet just within the immediate vicinity of the Rocco Property, and continues further out in either way away from the Rocco Property." Respondents allege that this seawall is a man-made wall that existed prior to August 20, 1977, the date specified in 6 NYCRR § 661.4(b)(1)(ii) defining the

extent of the Department's tidal wetland adjacent area jurisdiction.

Respondents submit a number of documents in support of their contention that the pre-existing seawall is a structure that limits the Department's jurisdiction including the United States Geological Survey (USGS) Flushing Quadrangle dated 1966; photos - both historic and current; and the DEC Tidal Wetlands Map 598-516. In addition, respondents maintain that in addition to the seawall, the property in question contained a small concrete retaining wall and the recent work done was a modification of that pre-existing retaining wall. Mr. Gross states that this retaining wall is not a seawall, that the water line does not approach this structure, and that its purpose is to allow for containment of the residential lot. Respondents cite 6 NYCRR § 661.5(b) use #26 in support of their position that reconstruction of this pre-existing retaining wall falls outside DEC's jurisdiction. In his affidavit, Mr. Gross contests the staff's description of the pre-existing shoreline on this subject property as "a vegetated, gentle slope." Rather, the respondents argue that documentary evidence submitted in the form of photographs shows that the area is "characterized by man-made seawalls, . . ."

In response to staff's claims that the actions of the respondents caused the release of sediment into the tidal wetland, Mr. Gross maintains that there is "no evidence of such an occurrence . . . and there was a remarked absence of any sediments collected below the referenced weep holes."

Discussion

Section 622.12(d) of 6 NYCRR provides that "[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 [Civil Practice Law and Rules] in favor of any party." Section 622.12(e) provides that "[t]he motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing."

CPLR 3212(b) requires that papers in support of a motion for summary judgment must include an affidavit by a person with actual knowledge of the facts, must be based on admissible evidence, and must show that there is no defense to the cause of action. See, Winegrad v. New York University Medical Center, 64 NY2d 851 (1985). The motion should be denied "if any party shall show facts sufficient to warrant a trial on any issue of fact." Caruso v. New York City Police Dep't Pension Funds, NYLJ, Dec. 27, 1985 at 6, col. 1 (Sup. Ct. NY Co.). If the opposing papers

disclose the existence of a material issue of fact or even the "color" of a triable issue, summary judgment must be denied. Newin Corp. v. Hartford Acc. & Indemn. Co., 62 NY2d 916 (1984).

While staff has submitted the affidavit of its marine biologist in support of the allegations in the motion for order without hearing, the respondents have presented the affidavit of an expert that raises many questions about the threshold issues in this matter. That is, whether DEC has tidal wetland adjacent area jurisdiction over the property and activity in question. While the respondents do not contest that the subject property neighbors a tidal wetland and that they constructed a retaining wall, they point to a seawall that they argue marks the landward boundary of the Department's tidal wetlands authority. Whether this seawall meets the definition of structures set forth in 6 NYCRR § 661.4(b)(ii) or not is an appropriate subject of a fact-finding hearing. The respondents have presented sufficient information in their responsive papers to demonstrate that material facts are in question and therefore, summary judgment is not appropriate.

Concerning the property dispute between the respondent Malba Association and the remaining respondents, the Roccos allege that they have title of the contested real property based upon adverse possession. However, this issue is not relevant to the staff's allegations and this forum is not the appropriate one to settle such questions. The issue of title will have to be determined by the Supreme Court in the respondents' pending litigation.

Conclusion

Staff's motion for an order without hearing is denied. The respondents have shown the existence of material issues of fact with respect to liability and any potential penalty. Accordingly, I direct staff to file a Statement of Readiness in accordance with 6 NYCRR § 622.9 when it is ready to proceed to a hearing.

Dated: Albany, New York
June 15, 2006

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

TO: Udo M. Drescher,
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 2
47-40 21st Street
One Hunter's Point Plaza
Long Island City, New York 11101

Luigi Brandimarte, Esq.
Tonino Sacco, Esq.
Sacco & Fillas
141-07 20th Avenue, Suite 506
Whitestone, New York 11357

Nicholas G. Kaizer, Esq.
Law Offices of Richard Ware Levitt
148 E. 78th Street
New York, New York 10021