

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”), by:

RULING

DEC Case No.
2-204609

R.S.T.Z. Associates, R. Chmarzewski

Respondent

Procedural Background

By notice of motion dated July 2, 2004, staff of the Department of Environmental Conservation (“DEC” or “Department”) sought a judgment by default against respondents R.S.T.Z. Associates (“R.S.T.Z.”) and R.Chmarzewski (“Chmarzewski”) concerning alleged violations of the Article 17 of the Environmental Conservation Law (“ECL”). DEC Staff identifies the named respondents as one respondent in the default motion and supporting affirmation with no further explanation. It is alleged by DEC that R.S.T.Z. and Chmarzewski violated Article 17 of the ECL by failing to register a petroleum bulk storage facility at 7224 4th Ave. Brooklyn, N.Y. In support of its motion, DEC submitted an affirmation of Associate Attorney Benjamin A. Conlon, a proposed order and a certified mail return receipt regarding service of a notice of hearing complaint that names respondent R.S.T.Z. only as a respondent. The certified mail return receipt is addressed to both R.S.T.Z. and Chmarzewski, at the same address, but does not identify who received the mailing.

As of the date of the motion, respondent R.S.T.Z. has not appeared and served an answer or otherwise moved. DEC Staff submitted proof that said notice of hearing and complaint directed respondent R.S.T.Z. to appear for a pre-hearing conference on May 20, 2004. The affirmation of attorney Conlon indicates that respondent R.S.T.Z. failed to appear at said conference and did not obtain, nor request an adjournment of the conference.

Default Procedures:

6 NYCRR 622.15, "Default Procedures" provides, in pertinent part: (b) The motion for a default judgment must contain: (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order." DEC Staff has not established that the notice of hearing and complaint were served on respondent R.S.T.Z. Chmarzewski was not a named party in the notice of hearing and complaint and therefore is not a proper party for the default.

Ruling

The motion for default judgment is denied.

/s/

Molly T. McBride
Administrative Law Judge

Albany, New York
July 30, 2004

To: Benjamin A. Conlon, Esq.
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