

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

---

In the Matter of the Alleged Violations of Article 17 and 71 of the New York State Environmental Conservation Law (“ECL”) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

**RULING ON MOTION  
FOR ORDER WITHOUT  
HEARING IN LIEU OF  
COMPLAINT**

- by -

DEC Case No.  
R2-20170608-215

**555 PROSPECT ASSOCIATES, LLC, 545  
PROSPECT PLACE HOUSING DEVELOPMENT  
FUND CORPORATION, and ALMA REALTY  
CORP.,**

August 7, 2019

Respondents.

---

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (James L. Simpson, Assistant Counsel, of counsel), for staff of the Department of Environmental Conservation.

-- Sullivan PC (Peter Sullivan, Esq. of counsel), for respondents 555 Prospect Associates, LLC, 545 Prospect Place Housing Development Fund Corporation, and Alma Realty Corp.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) alleges that respondents 555 Prospect Associates, LLC, 545 Prospect Place Housing Development Fund Corporation, and Alma Realty Corp. (respondents), violated a 2012 order on consent when respondents failed to properly close the petroleum bulk storage (PBS) registration for the facility located at 545-555 Prospect Place, Brooklyn, New York, Kings County (Block 1156, Lot 80). Department staff moves for an order without hearing, and respondents oppose. For the reasons that follow, Department staff’s motion is denied.

**PROCEEDINGS**

Department staff commenced this administrative enforcement proceeding by service on respondents of a notice of motion and a motion for order without hearing in lieu of complaint dated May 21, 2019 (*see* 6 NYCRR 622.12[a]). The motion was served on respondents by certified mail on May 21, 2019 (*see* Affirmation of Service of James Simpson, Esq. dated June 7, 2019). In support of its motion, Department staff filed an affirmation of James L. Simpson, Esq.

(Simpson Affirmation), Assistant Counsel, DEC Region 2, dated May 21, 2019. Attached to the Simpson Affirmation were several exhibits including:

- Petroleum Bulk Storage Facility Information Report for PBS # 2-347647 (Staff Exhibit A).
- Deeds transferring ownership of 545 Prospect Place, Brooklyn, New York (Block 1156, Lot 80) (Staff Exhibit B).
- New York State Department of State entity information for respondents (Staff Exhibit C).
- 2012 Order on Consent (R2-20120320-184) between the Department and respondent 555 Prospect Associates, LLC., regarding the facility located at 545-555 Prospect Place, Brooklyn, New York (Staff Exhibit D).
- Several letter and email correspondence between Department counsel and counsel for respondents (Staff Exhibits E-J, L).
- Email with attached report of subsurface investigation for storage tanks' anomalies prepared for 480 St. Marks Avenue, Brooklyn, New York (Staff Exhibit K).

In the motion, staff charges that respondents violated a 2012 Order on Consent and ECL 71-1929(1) by failing to “properly close the registration for the PBS facility located at 545-555 Prospect Place, Brooklyn, New York (Kings County, Tax Block 1156, Lot 80), within 30 days.” Staff seeks an order imposing a civil penalty on respondents in the amount of \$37,500. Staff also seeks an order requiring respondents to “engage a consultant to survey the facility; identify the location of the eight (8) registered tanks; ascertain what happened to them if they are no longer present; and certify that all of the tanks were or will be closed properly pursuant to the PBS regulations.”

Respondents requested and Department staff granted an extension of time to respond to the motion. Accordingly, on June 21, 2019, respondents served and filed papers in opposition to staff's motion. Respondents' papers include:

- Affirmation in Opposition of Peter Sullivan, Esq.
- Affidavit in Opposition of Angelo Zoumas, Director of Compliance for Respondent Alma Realty Corp., with a copy of the tax lot map for Block 1156, Lot 80 (Exhibit A).
- Memorandum of Law in opposition to the motion for order without hearing in lieu of complaint.

In their response, respondents argue that the motion must be denied because the facility located at 555 Prospect Place, Brooklyn, New York (Kings County Tax Block 1156, Lot 80) “does not now and has never contained eight petroleum bulk storage tanks.” In addition, respondents allege that the Department has failed to provide an affidavit from staff with personal knowledge of the facts alleged in the motion. Finally, respondents argue that Alma Realty Corp. and 545 Prospect Place Housing Development Fund Corporation were not signatories to the consent order and therefore Department staff have failed to establish their liability.

After the filing of respondents' response with the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to the undersigned Administrative Law Judge (ALJ).

## DISCUSSION

A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the causes of action or defenses are established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (*see* 6 NYCRR 622.12[d]). The motion will 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 (*see* 6 NYCRR 622.12[e]).

Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (*see Cheeseman v Inserra Supermarkets, Inc.*, 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has made a prima facie showing, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (*Cheeseman*, 174 AD2d at 957-958).

A motion for order without hearing is served with "supporting affidavits reciting all the material facts and other available documentary evidence" (6 NYCRR 622.12[a]). Motions for order without hearing are governed by the same principles that govern summary judgment motions brought pursuant to CPLR 3212 (*see* 6 NYCRR 622.12[d]; *see also Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, Commissioner's Final Decision and Order, June 16, 2003, at 3).

Upon a review of the papers submitted by Department staff as well as respondents, I find that substantive issues of fact are in dispute that require a hearing. These include but are not limited to, the existence and location of the eight petroleum bulk storage tanks that are the subject of the consent order, and the potential liability of each of the named respondents. Accordingly, Department staff's motion for order without hearing in lieu of complaint is denied. I direct Department staff to file a statement of readiness when it is ready to proceed to hearing.

/s/  
Michele M. Stefanucci  
Administrative Law Judge

Dated: Albany, New York  
August 7, 2019