

**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 Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR"),

ORDER

- by -

DEC Case No.
2-453072NDG

836 FAILE REALTY LLC,

Respondent.

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation ("Department") that 836 Faile Realty LLC ("respondent") violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister the petroleum bulk storage facility located at 836 Faile Street, Bronx, New York, within thirty (30) days of the transfer of ownership of the facility to it. Located at the facility is a 3,000-gallon aboveground petroleum bulk storage tank.

Administrative Law Judge ("ALJ") Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter, failed to appear at a pre-hearing conference scheduled for April 21, 2015, and failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015 (see Hearing Report at 4-5 [Finding of Fact No. 9]). The hearing was reconvened on July 21, 2015 (see Hearing Report at 2).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 5-6). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report at 5-6). Accordingly, staff is entitled to a judgment based on record evidence.

ECL 71-1929 provides for a civil penalty of up to thirty-seven thousand five hundred dollars (\$37,500) per day for each violation. Department staff, in its papers, sought a civil penalty of ten thousand dollars (\$10,000). The ALJ granted Department staff's motion at the hearing to amend its pleadings to reduce the civil penalty to five thousand dollars (\$5,000).

In these types of cases, where facilities have not registered or renewed their registrations within the past two years, and no other violations or mitigating or aggravating factors exist, a civil penalty of five thousand dollars (\$5,000) has been assessed (see Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Here, respondent's application to reregister the facility was due within thirty (30) days of December 23, 2013 when ownership was transferred to respondent. Respondent has failed to reregister the facility for one and one-half years (see Hearing Report at 4 [Finding of Fact No. 7]). Based on this record, the requested penalty of five thousand dollars (\$5,000) is authorized and appropriate.

I also direct that respondent submit an application to the Department to reregister the facility within fifteen (15) days of service of this order upon it, together with all applicable registration fees.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent 836 Faile Realty LLC waived its right to be heard at the hearing.
- II. Moreover, based upon record evidence, respondent 836 Faile Realty LLC is adjudged to have violated ECL 17-1009 and 6 NYCRR 612.2(b) for failing to reregister its petroleum storage facility located at 836 Faile Street, Bronx, New York within thirty (30) days of the transfer of ownership to it.
- III. Within fifteen (15) days of the service of this order upon respondent 836 Faile Realty LLC, respondent shall submit to the Department a complete petroleum bulk storage registration application for the facility, plus applicable registration fees.
- IV. Within fifteen (15) days of the service of this order upon respondent 836 Faile Realty LLC, respondent shall pay a civil penalty in the amount of five thousand dollars (\$5,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- V. The facility petroleum bulk storage registration application, applicable registration fees, and the penalty payment shall be sent to the following address:

Office of General Counsel
NYS Department of Environmental Conservation
Remediation Bureau
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Deborah Gorman, Esq.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Deborah Gorman, Esq. at the address referenced in paragraph V of this order.

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HEARING REPORT

DEC Case No.
2-453072NDG

- by -

836 FAILE REALTY LLC,

Respondent.

Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served respondent 836 Faile Realty LLC ("respondent") with a notice of hearing and complaint, dated March 20, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), for failing to reregister the petroleum bulk storage facility located at 836 Faile Street, Bronx, New York 10474, within 30 days of the transfer of ownership of the facility to it. The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 17-1009 and 6 NYCRR 612.2(b); (2) assessing a civil penalty in the amount of ten thousand dollars (\$10,000); (3) directing respondent to reregister its petroleum bulk storage facility within fifteen (15) days of the service of the Commissioner's order; and (4) granting such other and further relief as the Commissioner may deem just and appropriate.

Inasmuch as respondent is an active domestic limited liability company in the State of New York, service of the notice of hearing and complaint on respondent was made by serving the New York State Department of State on March 20, 2015 (see Staff Exhibit 3). Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on March 20, 2015. Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for April 21,

2015, as directed in the cover letter served with the notice of hearing and complaint.

As stated in the notice of hearing, on May 19, 2015, an adjudicatory hearing was convened before me at the Department's Region 2 offices, 1 Hunter's Point Plaza, 47-40 21st Street, Long Island City, New York 11101-5407. Department staff was represented by Deborah Gorman, Esq., Remediation Bureau, Office of General Counsel, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1500. 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, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff orally moved for a default judgment pursuant to 6 NYCRR 622.15. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b). Moreover, I noted Department staff's readiness for hearing, noted the failure of respondent to appear and advised that the hearing, in the absence of respondent, would be convened at a subsequent time or on a subsequent date.

At 10:57 am on July 21, 2015, the adjudicatory hearing was convened before the undersigned at the Department's Central Office at 625 Broadway, Albany, New York 12233. Department staff was represented by law student intern Ashley L. Fischer under the supervision of Benjamin Conlon, Esq., Associate Attorney, Remediation Bureau, Office of General Counsel. Department staff orally renewed its motion for a default judgment and also sought judgment on the merits.

Department staff called one witness, Cynthia Freedman, an Environmental Program Specialist 2 in the Registration and Permit Section of the Department's Division of Environmental Remediation. In all, ten (10) exhibits were received in evidence.

Applicable Regulatory Provision

Section 612.2. Registration of Facilities.

"(a) *Existing facilities.*

"(1) Within one year of the effective date of these regulations, the owner of any petroleum storage facility

having a capacity of over 1,100 gallons must register the facility with the department. This shall include any out-of-service facility which has not been permanently closed.

"(2) Registration must be renewed every five years from the date of the last valid registration until the department receives written notice that the facility has been permanently closed or that ownership of the facility has been transferred.

"(b) *Transfer of ownership.* If ownership of the facility changes, the new owner must reregister the facility with the department within 30 days of ownership transfer."

Findings of Fact

The following findings of fact are found based upon the preponderance of evidence presented at the hearing (see 6 NYCRR 622.11[c]):

1. Respondent 836 Faile Realty LLC is the owner of a petroleum bulk storage facility having a capacity of over 1,100 gallons located at 836 Faile Street, Bronx, NY 10474 ("facility"). In particular, petroleum storage tank number 1 at the facility has a capacity of 3,000 gallons and is located above ground. (Testimony of Cynthia Freedman; Staff Exhibits 5, 7 and 8.)
2. Respondent is an active domestic limited liability company in the State of New York. (Testimony of Cynthia Freedman; Staff Exhibit 4.)
3. On February 24, 2009, the Department issued Petroleum Bulk Storage ("PBS") Registration Certificate No. 2-453072 to the MHM Equities LLC, which owned the facility at that time. This registration expired on May 17, 2014. Moreover, in bold capital letters, at the bottom of the Certificate is the following declaration: "THIS REGISTRATION CERTIFICATE IS NON-TRANSFERABLE." (Testimony of Cynthia Freedman; Staff Exhibit 7.)
4. On December 23, 2013, MHM Equities LLC, by deed, transferred all right, title and interest in the facility to respondent 836 Faile Realty LLC, the facility's current owner. This deed is recorded in the Office of the City Register of the City of New York, as City Registry File No. 2014000027758. (Testimony of Cynthia Freedman; Staff Exhibit 6.)

5. Cynthia Freedman is an Environmental Program Specialist 2 in the Registration and Permit Section of the Department's Division of Environmental Remediation. Ms. Freedman has been employed in that position for twelve and a half years and is authorized to access and inspect the Department's unified information system ("UIS") and the electronic repository for scanned documents known as DecDOCS. The UIS and DecDOCS are databases maintained by the Department and contain petroleum bulk storage facility records filed with the Department, which records include petroleum bulk storage facility registrations filed pursuant to 6 NYCRR 612.2. (Testimony of Cynthia Freedman; see also Staff Exhibit 2, Affidavit of Brooke Turallo.)
6. On July 21, 2015, Cynthia Freedman searched the petroleum bulk storage facility records contained in the Department's UIS and DecDOCS for any petroleum bulk storage facility registration or renewal registration or any petroleum bulk storage facility reregistration filed by respondent for the facility. (Testimony of Cynthia Freedman; Staff Exhibit 8.)
7. As a result of her search, Cynthia Freedman determined that respondent had not reregistered the facility since respondent took ownership on December 23, 2013. (Testimony of Cynthia Freedman; Staff Exhibits 7 and 8.)
8. As shown by Receipt for Service No. 201503300239 issued by the New York State Department of State, respondent was personally served on March 20, 2015, pursuant to section 303 of the Limited Liability Company Law, with a notice of hearing and complaint dated March 20, 2015, alleging a violation of ECL 17-1009 and its implementing regulation, 6 NYCRR 612.2(b), together with a cover letter, statement of readiness and supporting affidavit, for failure to reregister its petroleum bulk storage facility located at 836 Faile Street, Bronx, NY 10474 within 30 days of the transfer of ownership of the facility to it. Consistent with CPLR 3215(g)(4), Department staff also provided additional service by sending the notice of hearing and complaint to respondent by regular mail on March 20, 2015. (Staff Exhibit 3.)
9. Respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 21, 2015, as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May

19, 2015, as directed in the notice of hearing. (Hearing Record.)

Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a] ["A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and a waiver of respondent's right to a hearing"]).

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

Department staff's proof presents a prima facie case demonstrating that respondent failed to reregister its petroleum bulk storage facility located at 836 Faile Street, Bronx, NY 10474, within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 612.2(b).

The record shows that Department staff duly served the notice of hearing and complaint upon respondent; and that respondent failed to file an answer to the complaint; failed to appear at a pre-hearing conference scheduled for April 21, 2015,

as directed in the cover letter served with the notice of hearing and complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on May 19, 2015, as directed in the notice of hearing. Department staff provided its proposed order at the July 21, 2015 hearing (Staff Exhibit 10). The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to reregister its petroleum storage facility within 30 days of the transfer of ownership of the facility to it, in violation of ECL 17-1009 and 6 NYCRR 612.2(b). The Department is entitled to judgment upon the facts proven. At the July 21, 2015 hearing, Department staff orally moved to amend the pleadings to reduce the civil penalty requested to five thousand dollars (\$5,000). Pursuant to 6 NYCRR 622.10(b)(1)(i), I granted Department staff's motion to amend the pleadings as there is no prejudice to respondent in reducing the penalty requested.

Department staff's proposed order and the five thousand dollar (\$5,000) civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71 and administrative precedent (see e.g. Matter of 12 Martense Associates LLC, Order of the Commissioner, December 19, 2011, at 2).

Conclusion of Law

By failing to reregister its petroleum bulk storage facility located at 836 Faile Street, Bronx, NY within 30 days of transfer of ownership of the facility to it, the respondent violated ECL 17-1009 and 6 NYCRR 612.2(b).

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. granting Department staff's motion for default, holding respondent in default pursuant to the provisions of 6 NYCRR 622.15;
2. holding that, based upon the proof adduced at the adjudicatory hearing, respondent violated ECL 17-1009 and 6 NYCRR 612.2(b) by failing to reregister its petroleum bulk storage facility located at 836 Faile Street, Bronx,

NY 10474, within 30 days of the transfer of ownership of the facility to it;

3. directing respondent to submit a complete registration application to the Department for the above facility within fifteen (15) days of service of the Commissioner's order together with the applicable registration fees;
4. directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000) within fifteen (15) days of service of the Commissioner's order; and
5. directing such other and further relief as he may deem just and proper.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
July 27, 2015

EXHIBIT CHART – PBS EXPEDITED PROCEEDINGS

Matter of 836 Faile Realty LLC, 836 Faile Street, Bronx, New York – DEC Case No. 2-453072NDG
 July 21, 2015 – Central Office
 Edrol File No. 011228075723

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	June 2, 2015 Practice Order of the Appellate Division, Third Department (Peters, P.J.), for appointment of law interns, including Ashley L. Fischer.	✓	✓	Department Staff	
2	Cover Letter from Deborah Gorman, Esq. to respondent, with Notice of Hearing, Complaint, and Statement of Readiness, all dated March 20, 2015 and Affidavit in Support of Notice of Hearing and Complaint of Brooke Turallo, sworn to March 18, 2015.	✓	✓	Department Staff	
3	Affidavit of Service of Brooke Turallo, sworn to July 17, 2015 with New York State Department of State Receipt for Service dated March 20, 2015.	✓	✓	Department Staff	
4	NYS Department of State Entity Information, dated July 20, 2015.	✓	✓	Department Staff	
5	PBS Application, dated February 18, 2009.	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	New York City Department of Finance, ACRIS Title Search, dated July 20, 2015 and deed to respondent, dated December 23, 2013.	✓	✓	Department Staff	
7	PBS Registration Certificate, issued February 24, 2009, expiration date May 17, 2014.	✓	✓	Department Staff	
8	PBS Program Facility Information Report, dated July 20, 2015.	✓	✓	Department Staff	
9	Affirmation of attempted contact by Deborah Gorman, dated July 17, 2015.	✓	✓	Department Staff	
10	Proposed Order.	✓	✓	Department Staff	