

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Violations of the
Environmental Conservation Law Article
33 and Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York,

**Ruling on Motion
for Default
Judgment and Order**

- by -

DEC Case No.
R4-2008-1117-162

**DOUGLAS ABAIRE
d/b/a Critters and Creatures,**

Respondent.

Summary

This ruling denies without prejudice a motion for default judgment and order made by staff of the New York State Department of Environmental Conservation's (DEC staff). The motion and attached papers fail to show proof of service of the amended notice of hearing and amended complaint on the respondent, Douglas Abaire, d/b/a Critters and Creatures, as required by section 622.15(b)(1) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

Proceedings

By papers dated August 18, 2009, DEC Staff Region 4 office moved for a default judgment and order against the respondent Douglas Abaire, d/b/a Critters and Creatures. DEC Staff's papers included a notice of motion, motion for default judgment and order and DEC Staff counsel's affirmation in support of the motion. Attached to the affirmation were: (1) an affidavit of service; (2) a copy of an amended notice of hearing and amended complaint dated May 27, 2009; and (3) a proposed order.

In the amended complaint, DEC Staff alleged four violations of Article 33 of the Environmental Conservation Law (ECL), and its implementing regulations (6 NYCRR 325) discovered during a November 12, 2008 inspection of respondent's business located at 68 Lawrence St., Rensselaer, NY. The four causes of action are that respondent: (1) failed to carry business insurance in violation of 6 NYCRR 325.23(g); (2) failed to provide customers with a copy of the pesticide label information, including warnings, in violation of ECL 33-905.5(a); (3) failed to retain

pesticide application records for a minimum of three years in violation of ECL 33-1205; and (4) applied an unregistered product, Hot Shot Flying Insect Plus (EPA Reg #9688-111-8845), in violation of ECL 33-1301.

DEC staff states that it personally served upon respondent a notice of motion for default judgment. DEC Staff also filed a copy of this motion with the Department's Office of Hearings and Mediation Services (OHMS). Chief Administrative Law Judge James T. McClymonds assigned this matter to me on August 21, 2009.

Respondent did not oppose DEC Staff's motion or otherwise appear.

Discussion

DEC's Uniform Enforcement Hearing Procedures authorize DEC Staff to make a motion for a default judgment (6 NYCRR 622.15(b) and requires DEC Staff to provide:

- (1) proof of service of the notice of hearing and complaint or motion for order without hearing;
- (2) proof of the respondent's failure to file a timely answer; and
- (3) a proposed order.

As discussed below, DEC Staff has failed to show proof of service of the amended notice of hearing and amended complaint upon the respondent and is not entitled to a default order and judgment.

DEC's regulations provide that service of a notice of hearing and complaint must be by personal service consistent with the CPLR (Civil Practice Law and Rules) or by certified mail (6 NYCRR 622.3(a)(3)).

In her affirmation, DEC Staff counsel states that on "June 7, 2009, Brian Canzeri, a NYS Environmental Conservation Officer, personally served an Amended Notice of Hearing and Complaint upon Douglas Abaire, D/B/A Critters and Creatures". However, this mischaracterizes the information in the ECO's affidavit.

In his affidavit of service, ECO Canzeri states he served a notice of hearing and complaint on Mrs. Abaire at 68 Lawrence St., Rensselaer, NY. Mrs. Abaire is described as a white female with light brown hair in the affidavit of service. Correspondence in the file are addressed to Mr. Abaire, and it is logical to assume that Douglas Abaire is male. Since the notice

of hearing and complaint were not delivered to Mr. Abaire, personal service was not made pursuant to CPLR 308(1).

Section 308(2) of the CPLR provides a second method of personal service. This section states that personal service can be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business ... of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or mailing the summons by first class mail to the person to be served at his or her actual place of business ... within twenty days of each other...." In this case, ECO Canzeri delivered a notice of hearing and complaint to respondent's place of business and there is nothing to suggest that Mrs. Abaire was not of a suitable age or discretion to receive the papers. However, DEC Staff has not shown a mailing to respondent subsequent to the ECO's delivery of the papers. Therefore, DEC Staff has not proved personal service in accordance the CPLR 308(2).

There is nothing in DEC Staff's papers to indicate that personal service was effected by any other method. Therefore, DEC Staff has failed to demonstrate that the respondent was personally served with a notice of hearing and complaint.

In addition, it should be noted that the ECO's affidavit references a notice of hearing and complaint, and not an amended notice of hearing and amended complaint referenced in DEC Staff counsel's affidavit. Another potential problem with DEC Staff's papers is the fact that while staff counsel affirms no answer was received to the amended complaint, there is no information as to whether or not the respondent answered the original complaint, assuming it was served upon respondent.

Ruling

Staff's motion for a default judgment does not meet the requirements of 6 NYCRR 622.15(b) because proof of service of the amended notice of hearing and amended complaint is not included with the motion.

Dated: Albany, New York
August 28, 2009

_____/s/
P. Nicholas Garlick
Administrative Law Judge