STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of
Article 27 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. 3-2934/9706

ANTHONY M. ADINOLFI and
DIRTMAN ENTERPRISES, INC.

Respondents.

Procedural Background

By motion dated July 18, 2006, staff of the Department of Environmental Conservation (DEC or Department Staff) moved for an order without hearing against Anthony Adinolfi and Dirt Man Enterprises, Inc. (respondents). The motion alleges respondents violated Article 27 of the Environmental Conservation Law (ECL) and Title 6 New York Code of Rules and Regulations (6 NYCRR) Part 360. Department staff submitted the following in support of the motion: affirmation of Carol Krebs, Esq., assistant regional attorney, dated July 18, 2006 and affidavit of David Pollock, environmental engineer I, in the NYS DEC Division of Solid and Hazardous Materials. Respondents opposed the motion by affirmation of Peter Sullivan, Esq., counsel for respondents dated September 5, 2006 and the affidavit of Anthony Adinolfi sworn to September 5, 2006. Department Staff has failed to meet the burden of proof and the motion is denied, as detailed herein.

Background

Department Staff alleges that the respondents violated 6 NYCRR 360-1.5(a) and 360-1.7(a)(1)(I) by disposing of construction and demolition (C & D) waste at a non-exempt site and constructing and operating a solid waste management facility without a permit from the Department. Respondents allege that the Department has failed to meet its burden with respect to the motion.

Staff's Position

Department Staff alleges that respondents deposited fill at private residences located at 22 and 26 Algonquin Trail, Briarcliff Manor, Westchester County (site). Department Staff submitted the affidavit of David Pollock, environmental engineer, who inspected the site. During the site visits Mr. Pollock observed "numerous violations of state laws and regulations at the Site" (Pollock affidavit at p.2). During a June 1999 inspection he observed non-exempt C & D waste deposited at the site. He further

stated that at subsequent inspections between June 1999 and November 2004[1] he observed that the waste had not been removed. During the final inspection in November 2004 test pits were dug at the site and a split sample was taken of the material at the site. The testing revealed the material to contain concrete, brick, asphalt, coal, coal ash and glass. He also visually observed dimensional lumber, plastic, tile, siding, metal, rags and a sleeping bag during the November 2004 inspection. The affirmation of Carol Krebs states that the respondents did not obtain a permit "or any other form of Department authorization" (Krebs affirmation p.4) to dispose of C & D waste at the site.

Department Staff submitted with the motion a certificate of disposition from Mount Pleasant, New York Town Court in the matter of People of the State of New York v. Anthony Adinolfi. Mr. Adinolfi was charged with two misdemeanors; violations of Environmental Conservation Law (ECL) section 71-2703(2)(c), and 71-1933(1) with regards to an incident of C & D waste disposal at two sites identified as the Bell and Pecora properties. Attached to the motion was a transcript of the proceedings held on October 14, 2004 in Mount Pleasant Town Court. The criminal charges were resolved with Anthony Adinolfi pleading guilty to a non-criminal violation of ECL 71-2703(2)(a). ECL 71-2703(2)(a) reads: "Any person who, having any of the culpable mental states defined in section 15.05 of the penal law, shall violate any of the provisions of or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter, or any rules and regulations promulgated pursuant thereto, or any final determination or order of the commissioner made pursuant to this title shall be guilty of a violation and, upon conviction thereof, shall be punished by a fine of not less than one thousand five hundred dollars nor more than fifteen thousand dollars per day of violation or by imprisonment for not more than fifteen days or by both such fine and imprisonment." There was no colloquy on the record by Mr. Adinolfi admitting to any
acts.

Respondents' Position

Respondents deny the illegal dumping, raise questions of others who engage in illegal dumping and note that Department Staff has failed to establish that respondents were the responsible parties. I will not address the arguments made about what other dumping may take place in the State and whether this case is singling out the respondents wrongfully. The point raised by respondents that Department Staff has not submitted any factual support for the allegation that respondents are the parties responsible for depositing C & D waste at the site is a valid argument.

Discussion

A contested motion for order without hearing brought pursuant to 6 NYCRR 622.12 shall be granted if, "... upon all of the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party."[2] Civil Practice Law and Rules (CPLR) 3212 allows for the granting of summary judgment when no issue of fact remains. A party may move for summary judgment, after issue is joined, pursuant to CPLR 3212. The

[1] The Pollock affidavit uses both November 2004 and November 2005 as the final date of inspection. For purposes of this motion, I will use the November, 2004 date.

[2] 6 NYCRR 622.12(d)

motion may be granted only upon a showing that the cause of action or defense is established sufficiently to warrant the Court as a matter of law to direct judgment in favor of a party. (CPLR 3212) CPLR 3212 states that "...the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

It is well established that the Court should consider the granting of such a motion a drastic and severe remedy that should be granted when there is no doubt as to the existence of a triable issue of fact *(Moskowitz v. Garlock, 23 AD 2d 943, 259 N.Y.S. 2d 1003).* In order to prevail upon a motion for summary judgment, the movant must first make a showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642.*

Although Department Staff relies on the Adinolfi plea agreement as determinative of both respondents' guilt, the transcript from Mt. Pleasant Town Court does not contain a specific reference to what acts Mr. Adinolfi was alleged to have committed. During the plea agreement proceedings, Mr. Adinolfi waived a formal reading of the charges against him. Finally, no specific acts were admitted to by Mr. Adinolfi to explain or support his plea of guilty to the non-criminal violation. The transcript references remediation to be completed by Mr. Adinolfi but the references are vague, without providing details of the address(es) where the work was to be completed. The site addresses identified in the motion for order without hearing are not mentioned in the Town court transcript, only property owners' names are used. Property owner names are not used in this motion, only property addresses.

The Krebs affirmation relies on the Commissioner's decision in the ***Matter of Richard Locaparra, d/b/a L & L Scrap Metals,*** DEC Case No. 3-200000407-39 (June 16, 2003). The ***Locaparra*** decision held that if a party is convicted of an offense in a criminal court, that party is collaterally estopped from disputing the facts already proven. In this case, there was no conviction, only a plea to a lesser, non-criminal charge. Also, there was no admission of guilt by respondent Adinolfi to any acts. The transcript is devoid of any details as to what Mr. Adinolfi was pleading guilty to. Finally, the criminal proceedings did not relate to Dirtman Enterprises, Inc. For the principle of collateral estoppel, or issue preclusion, to apply, there must be an identity of issue which has necessarily been decided in the prior action, and the party to be estopped must have had a full and fair opportunity to litigate the issue.[3] The transcript from the Town court is not sufficient to meet this burden.

The moving party carries the burden in a motion for order without hearing by submitting evidence sufficient to demonstrate the absence of any material issues of fact.[4] The affidavit may not consist of mere conclusory statements but must include specific evidence establishing a prima facie case with respect to each element of the cause of action that is the subject of the motion. Similarly, a party responding to a motion for summary judgment may not merely rely

[3] Locapara at p.5 citing See Gilberg v Barbieri, 53 NY2d 285, 291 (1981).

[4] See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

on conclusory statements and denials but must lay bare its proof.[5] The papers submitted in support of the motion, including the Krebs affirmation and the Pollock affidavit, do not provide any support for the allegation that respondents disposed of C & D waste at the two sites identified. Ms. Krebs' affirmation states that both respondents deposited fill at the site but she does not identify any support for that statement, no offer of proof is made. Mr. Pollock concludes that waste was deposited at the site located at 26 Algonquin Trail and that some of the debris spilled over onto the adjoining lot at 22 Algonquin Trail. He alleges that either Mr. Adinolfi and/or Dirtman Enterprises operated a solid waste facility at the site, however, he offered no support for that allegation.

Submitted with the motion is a Petition of Susan Brailey, assistant district attorney, which states that Mr. Adinolfi pleaded guilty to operating a solid waste management facility and that he deposited fill in the Town of Mt. Pleasant. This petition does not provide any property location that is identified in this motion. Also, the transcript of the court appearance by Mr. Adinolfi does not state he was pleading guilty to operating a solid waste management facility. Finally, the petition only addresses Mr. Adinolfi and not Dirtman Enterprises.

Ruling

The motion is denied. A telephone conference call will be held with counsel on May 29, 2007 at 10:00 a.m. to schedule a hearing in this matter.

_____/s/_____
MOLLY T. MCBRIDE
Administrative Law Judge

Dated: May 17, 2007
Albany, New York

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[5]See Hanson v Ontario Milk Producers Coop., Inc., 58 Misc 2d 138, 141-142 (Sup Ct, Oswego County 1968).