NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of the New York State Environmental Conservation Law (ECL) article 17, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 613 by

Dr. Eli Avila and Elena Avila,
RESPONDENTS.

Ruling on Department Staff's Motion for an Order without Hearing

DEC Case No. R2-20030422-102

June 28, 2004

Proceedings

This administrative enforcement action commenced with service of a notice of hearing and complaint both dated April 22, 2003 upon Eli and Elena Avila (the Avilas) by certified mail, return receipt requested. The complaint asserts that the Avilas own property located at 60 Hamilton Terrace, New York, New York (the site). According to the complaint, the Avilas became aware of a petroleum spill at the site on April 9, 1999 when they discovered more than 90 gallons of fuel oil on the floor of their basement. The complaint alleges that the Avilas violated 6 NYCRR 613.8 because they did not notify the Department of the spill at the site within two hours of its discovery. Rather, the Avilas allegedly did not report the petroleum spill to the Department until December 10, 2002, some 44 months later. According to the complaint, the site remains contaminated. It is unknown whether the Avilas answered the April 22, 2003 complaint (*see* 6 NYCRR 622.4[a]).

With a notice of motion dated April 16, 2004, Department Staff moved for an order without hearing pursuant to 6 NYCRR 622.12. Department Staff's papers consist of the notice of motion, an affidavit of service of the motion by Maxima Colon sworn to April 16, 2004, and an affirmation by David S. Rubinton, Esq., Assistant Regional Attorney. Attorney Rubinton attached three exhibits (R, S and T) to his affirmation. Copies of the notice of hearing and complaint dated April 22, 2003 are Exhibit R. Exhibit S is an affidavit of Jeffrey Vought sworn to March 4, 2004. Exhibit T is an affidavit by Eli Avila, M.D., sworn to July 12, 2002. Exhibit T was submitted as part of a civil action in Supreme Court, New York County (Index No. 113217/99) between the Avilas, as plaintiffs, and Robani Energy Incorporated (Robani), and Crystal Transportation Corporation (Crystal), as co-defendants.[1]

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[1] With service of a notice of hearing and complaint dated January 15, 2003, Department Staff commenced an enforcement action against Robani and Crystal (DEC Case No. R2-20030109-9). The January 15, 2003 complaint alleges that Robani and Crystal delivered the fuel oil to the site on April 9, 1999, which resulted in the petroleum spill. The January 15, 2003 complaint alleges that Robani and Crystal violated various provisions of the Navigation Law. However, in a notice of motion dated April 21, 2004, Department Staff moved for an order without hearing against Robani and Crystal for allegedly violating 6 NYCRR 613.8. There, as here, Department Staff will defer issues

In pertinent part, Attorney Rubinton's affirmation (Paragraph 1) states that "[t]his motion is for a determination of Respondent, Dr. Eli Avila's, liability only. The Department will defer to a live hearing at a later date to determine the issue of damages in this case."

The Avilas oppose Department Staff's motion for order without hearing, and filed an affirmation by Zara Sarkisova, Esq., dated May 25, 2004 and an affidavit by Dr. Eli N. Avila sworn to May 27, 2004. The Office of Hearings and Mediation Services received Dr. Avila's May 27, 2004 affidavit on June 1, 2004 and Attorney Sarkisova's affirmation on June 4, 2004.

Discussion

Motion for Order without Hearing

Department Staff requested an order without hearing against the Avilas pursuant to 6 NYCRR 622.12. That provision is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all 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.

The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated (*see Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order of the Commissioner, June 16, 2003). The Commissioner's discussion includes numerous citations to case law, the Department's enforcement regulations, and CPLR 3212.

The party moving for summary judgment has the burden of establishing "his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b])" (*Friends of Animals v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). The moving party carries this burden by submitting evidence sufficient to demonstrate the absence of any material issues of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). 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 on conclusory statements and denials but must lay bare its proof (*see Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc 2d 138, 141-142 [Sup Ct, Oswego County 1968]). The failure of a responding party to deny a fact alleged in the moving

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concerning damages or relief to a hearing. On June 28, 2004, I issued a ruling that denied Department Staff's motion for order without hearing against Robani and Crystal.

papers constitutes an admission of the fact (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544 [1975]).

Liability

In pertinent part, 6 NYCRR 613.8 states that, "[a]ny person with knowledge of a spill, leak or discharge of petroleum must report the incident to the department within two hours of discovery." Part 613 incorporates by reference the definitions outlined at 6 NYCRR 612.1(c) (*see* 6 NYCRR 613.1[c]). The term "person" is defined at 6 NYCRR 612.1(c)(20) as "any individual, public or private corporation, political subdivision, ... or any other legal entity." The term, "spill" or "spillage" is defined at 6 NYCRR 612.1(c)(24) as "any escape of petroleum from the ordinary containers employed in the normal course of storage, transfer, processing or use."

To demonstrate that Dr. Eli Avila violated 6 NYCRR 613.8, Department Staff offered a copy of an affidavit by Dr. Avila sworn to July 12, 2002 (Exhibit T), which was filed as part of a civil action against Robani and Crystal. Dr. Avila's July 12, 2002 affidavit establishes, among other things, that he resided at the house located at 60 Hamilton Terrace prior to April 9, 1999, and that he discovered a petroleum spill in the basement on the morning of April 9, 1999. The July 12, 2002 affidavit is silent about whether Dr. Avila attempted to report the spill to the Department.

In addition, Department Staff offered an affidavit by Jeffery Vought, Engineering Geologist I, sworn to March 4, 2004 (Exhibit S). According to Mr. Vought's affidavit, Dr. Avila retained Dr. Eugene Martin from Environmental Health as a consultant. In addition, Mr. Vought states that Dr. Martin was the first person to report the petroleum spill at the site to the Department on December 10, 2002, some 44 months after it occurred. Based on his affidavit, Mr. Vought inspected the site and the neighboring properties at 58 and 62 Hamilton Terrace on December 17, 2002 to determine whether petroleum had spread offsite. Mr. Vought determined that petroleum spill at the site had not spread to any neighboring properties. The Department identifies the petroleum spill at the site by No. 0209311.

Dr. Avila's May 27, 2004 affidavit raises a number of factual issues concerning circumstances that may mitigate the alleged violation, and when he notified the Department about the spill at the site. In his May 27, 2004 affidavit, Dr. Avila states that his infant son was overcome by the fumes shortly after the spill was discovered . Consequently, Dr. Avila left the site with his wife to take their son to the hospital for medical treatment. Dr. Avila then brought his family to a friends house.

Based on Dr. Avila's May 27, 2004 affidavit, he states that he called the Environmental Protection Agency (EPA) hotline on April 9, 1999 to report the spill at the site. Dr. Avila states further that the EPA operator directed him to call the Department to report the spill. Dr. Avila then called the Department at 800-457-7362 on April 9, 1999, and was directed by the operator

to call the New York City Department of Environmental Protection (NYC DEP) at 718-DEP-HELP (718-337-4357).

According to his May 27, 2004 affidavit, Dr. Avila subsequently called the NYC DEP hotline on April 9, 1999, and Keith Williams from the NYC DEP inspected the site on April 10, 1999. Dr. Avila states that Mr. Williams entered an oil spill report into the NYC DEP database. Though identified in the Avilas' reply papers, the Avilas did not include the NYC DEP spill report.

Dr. Avila goes on to state in his May 27, 2004 affidavit that he filed a claim with his insurance company and, as noted above, retained Dr. Martin to assess the spill at the site, and to develop a remediation plan. In the fall of 2002, Dr. Avila asked Dr. Martin to contact the Department about the petroleum spill. Dr. Martin did and, as previously mentioned, Mr. Vought subsequently inspected the site on December 17, 2002.

According to Attorney Sarkisova's affirmation, Department Staff's papers contain inaccurate statements of fact. In addition, the Avilas argue that the reporting requirement at 6 NYCRR 613.8 does not apply to them because the storage capacity of their fuel oil tank is about 275 gallons, which is less than the applicability criterion of 1,100 gallons (*see* 6 NYCRR 613.1[a]). Regardless of the applicability of 6 NYCRR part 613, the Avilas assert that Dr. Avila attempted to report the spill at the site to the Department, but the Department directed him to call NYC DEP. The Avilas conclude that they "timely and properly reported [the] petroleum in their basement to DEC" (Attorney Sarkisova's affirmation, paragraph 6).

The Avilas raise a threshold question about whether the reporting requirement at 6 NYCRR 613.8 applies to them. The Commissioner has previously determined that the term, "any person" in 6 NYCRR 613.8 should be interpreted broadly, and that the reporting duty is on everyone with knowledge of a petroleum spill (*see Matter of Donald Middleton; Middleton, Kontokosta Associates, Ltd.*, DEC Case No. R1-6039, Ruling of the Commissioner, December 31, 1998). Based on this administrative decision, I conclude that the reporting requirement at 6 NYCRR 613.8 applies to the Avilas. I conclude further that Dr. Avila was obliged to report the spill to the Department within two hours after he discovered it at the site on April 9, 1999.

Although the Avilas deny Department Staff's allegation that Dr. Avila failed to report the spill to the Department in a timely manner, I find that Dr. Avila did not "lay bare" his proof (*Hanson*, 58 Misc 2d at 142) about precisely when he attempted to notify the Department. The Avilas offer nothing to show that Dr. Avila notified the Department within two hours after discovering the spill as required by 6 NYCRR 613.8. Based on Dr. Avila's May 27, 2004 affidavit, it cannot be reasonably inferred that Dr. Avila reported the spill within two hours after its discovery. Rather, Dr. Avila reported the spill more than two hours after he discovered it given the intervening events associated with going to the hospital and finding an alternative housing arrangement for his family. Accordingly, I grant Department Staff's motion for an order without hearing with respect to Dr. Avila's liability.

As previously noted above, Department Staff seeks "a determination of Respondent, Dr. Eli Avila's, liability only" (Attorney Rubinton's affirmation, paragraph 1). Therefore, I conclude, as a matter of law, that within the context of this motion, Department Staff did not make a prima facie showing about Elena Avila's liability. The proof offered in the Department Staff's motion consisted of Dr. Avila's July 12, 2002 affidavit and Mr. Vought's March 4, 2004 affidavit. Both documents are silent about whether Elena Avila knew about the spill.

Relief

Department Staff requests a hearing about the appropriate relief (*see* Attorney Rubinton's affirmation, paragraph 1). Though I have concluded that Dr. Avila violated 6 NYCRR 613.8 because he failed to notify the Department within two hours after he discovered the spill at the site on April 9, 1999, Dr. Avila's May 27, 2004 affidavit identifies a number of factual issues that may substantially mitigate the violation. At hearing, Dr. Avila will have an opportunity to develop the facts associated with these potential mitigating factors, and Department Staff will have an opportunity to examine the evidence that Dr. Avila offers to prove these factors. In addition, there is a factual issue about how long the violation continued. Based on Dr. Avila's May 27, 2004 affidavit, he reported the spill on April 9, 1999. However, Mr. Vought states in his March 4, 2004 affidavit, that Dr. Martin reported the spill to the Department for the first time on December 10, 2002. The duration of the violation is a significant factor in determining the appropriate civil penalty, and the parties will have an opportunity at hearing to develop their respective cases.

Findings of Fact

The April 22, 2003 complaint and Department Staff's April 16, 2004 motion do not allege when the spill occurred or who caused the spill. Accordingly, I make no findings of fact related to these questions in this ruling. Based on the foregoing discussion, the facts established as a matter of law are:

1. Prior to April 9, 1999, Eli and Elena Avila resided at 60 Hamilton Terrace, New York, New York (the site). At the site, there is a fuel oil tank in the basement with a capacity of about 275 gallons.

2. On April 9, 1999, the Avilas awoke to a strong, overwhelming odor of oil at the site. As a result of these odors, Dr. Avila inspected the basement and observed a pool of fuel oil on the basement floor.

3. Dr. Avila did not report the spill at the site to the Department within two hours after discovering it.

4. Jeffery Vought, Engineering Geologist I, from the Department's Region 2 office, inspected the site on December 17, 2002, and concluded that an oil spill had occurred there.

5. On December 17, 2002, Mr. Vought also inspected 58 and 62 Hamilton Terrace. These properties are located on either side of the site. During his inspection of the neighboring properties, Mr. Vought did not detect any petroleum odors or other impacts from the spill at the neighboring properties.

Conclusions

1. The reporting requirement outlined at 6 NYCRR 613.8 applies to the Avilas.

2. Department Staff established a prima facie entitlement to judgment as a matter of law that Dr. Eli Avila violated 6 NYCRR 613.8 when he failed to report a petroleum spill at 60 Hamilton Terrace on April 9, 1999 within two hours after he discovered it. I conclude further that Dr. Avila failed to raise a triable issue of fact concerning whether he reported the spill to the Department within two hours after he discovered it.

Ruling

I grant Department Staff's motion for order without hearing, with respect to Dr. Eli Avila's liability.

Further Proceedings

A hearing shall be convened as soon as possible to determine the appropriate relief. I would like to schedule a telephone conference call for 10:00 a.m. on July 12, 2004 to determine the hearing date. In anticipation of the July 12, 2004 telephone conference call, be advised that I am available to convene the hearing at the Department's Region 2 office on July 19, 21-23 and on August 2, 5-6, 9, 12, 13, 16, 18-20, 23, 25-27.

The parties shall advise me of their availability for the July 12, 2004 telephone conference call by close of business on July 9, 2004.

Finally, if Department Staff intends to pursue the claim against Elena Avila, Department Staff shall advise Respondents' counsel and me during the July 12, 2004 telephone conference call.

Daniel P. O'Connell
Administrative Law Judge

Dated: June 28, 2004
Albany, New York

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