STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the matter of the alleged violation(s) of the New York State Environmental Conservation Law (ECL) Articles 3, 17 and 23, Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR), and permits issued pursuant to Environmental Conservation Law Article 17, Title 8 and Article 23, Title 13; and the application for ECL Article 23 modification permit; by

BATH PETROLEUM STORAGE, INC., E.I.L. PETROLEUM, INC., and ROBERT V. H. WEINBERG

RULING ON MOTION TO DISMISS

DEC Case No: R8-1088-97-01
and
ECL Article 23-1301 Permit Hearing

PROCEEDINGS

By motion dated November 25, 2003, respondent Robert V. H. Weinberg ("Respondent Weinberg") moved to dismiss the complaint against him in this matter. In that complaint, referred to hereinafter as the "2003 Amended Complaint," staff of the New York State Department of Environmental Conservation ("Department Staff") sought to impose liability upon Respondent Weinberg for alleged violations of Articles 3, 17, and 23 of the Environmental Conservation Law ("ECL"), as well as violations of a State Pollutant Discharge Elimination ("SPDES") permit issued to E.I.L. Petroleum, Inc. ("EIL").

EIL is a corporation engaged in the international and domestic bulk purchase and sale of liquefied petroleum gases ("LPG"). Bath Petroleum Storage, Inc. ("BPSI"), a wholly-owned subsidiary of EIL, operates an LPG gas storage facility (the "Facility") in Bath, New York. According to the 2003 Amended Complaint, Respondent Weinberg is the president, director and sole stockholder of EIL, and the president of BPSI. The 2003 Amended Complaint alleges further that BPSI and EIL are solely owned by Respondent Weinberg. This action was commenced in March 1997 by service of a Notice of Hearing and Complaint upon BPSI and EIL (hereinafter the "Corporate Respondents").

In a ruling dated March 27, 2000, Administrative Law Judge ("ALJ") Helene G. Goldberger granted Department Staff's motion to amend the complaint to add Respondent Weinberg as a respondent. Matter of E.I.L. Petroleum, Inc., 2000 WL 33340964, * 6 (Ruling,

Mar. 27, 2000). Following motion practice,[1] Department Staff was directed to serve the 2003 Amended Complaint upon Respondent Weinberg. Matter of Bath Petroleum Storage, Inc., et al., 2003 WL 22456078, *3 (Ruling, October 23, 2003).

Respondent Weinberg's present motion asserts that, due to a defect in the service of the 2003 Amended Complaint, Department Staff failed to acquire personal jurisdiction over him. The motion contends further that the 2003 Amended Complaint's claims are untimely, inasmuch as Mr. Weinberg was not afforded a hearing within a reasonable time. According to Respondent Weinberg, Department Staff purposely delayed serving the 2003 Amended Complaint, to Respondent Weinberg's detriment. Respondent Weinberg also maintains that all of the claims in the 2003 Amended Complaint are barred by the applicable statute of limitations. In addition, Respondent Weinberg argues that the allegations in the 2003 Amended Complaint that seek to impose joint and several liability must be stricken. Department Staff opposes the motion.

For the reasons that follow, the motion is denied. Pursuant to the scheduling order incorporated as part of this ruling, Mr. Weinberg is directed to serve an answer to the 2003 Amended Complaint. Following Mr. Weinberg's answer to the 2003 Amended Complaint, discovery, which has been ongoing with respect to the Corporate Defendants, will take place with respect to all of Department Staff's allegations and any affirmative defenses asserted by Mr. Weinberg.

POSITIONS OF THE PARTIES

Respondent Weinberg's motion argues that service of the 2003 Amended Complaint was untimely, because it was not served within 120 days of ALJ Goldberger's March 27, 2000 ruling granting Department Staff's motion to add Mr. Weinberg as a respondent. According to Respondent Weinberg, service within 120 days is mandated by Section 306-b of the New York Civil Practice Law and Rules ("CPLR"). Respondent Weinberg contends that service was also defective because Department Staff failed to comply with the ALJ Maria Villa's direction in a ruling dated October 23, 2003, which provided for service of the 2003 Amended Complaint "by ordinary mail" on or before November 17, 2003.

In its opposition, Department Staff points out that the wording of the ruling required service "by ordinary mail," arguing that service upon Mr. Weinberg complied with this directive. In addition, Department Staff notes that service was also effected by certified mail upon Respondent Weinberg. As part of its opposition, Department Staff submitted the Affidavit of Lisa Perla Schwartz, Esq., sworn to December 5, 2003 (the "Schwartz Affidavit"). The Schwartz Affidavit indicates that Mr. Weinberg signed for the certified mail service on November 19, 2003.

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[1] The permit and enforcement matters were joined in a July 26, 2002 ruling on Department Staff's motion to consolidate. Matter of Bath Petroleum Storage, Inc., 2002 WL 1824983, *11 (Ruling, July 26, 2002). In an Interim Decision dated June 17, 2003, Commissioner Erin M. Crotty dismissed BPSI's appeal of the Ruling, as well as a cross appeal by Department Staff. Matter of Bath Petroleum Storage, Inc., 2003 WL 21707875, *1-2 (Interim Decision, June 17, 2003).

According to Department Staff, CPLR 306-b requires service within 120 days of the filing of the complaint with the court. Department Staff points out that it filed the 2003 Amended Complaint with the Office of Hearings and Mediation Services ("OHMS") on November 17, 2003, and served Respondent Weinberg within two days of filing.

The motion goes on to argue that Department Staff's claims are time barred, pointing out that Department Staff did not commence this action as against Respondent Weinberg until November 2003, and arguing further that Department Staff cannot avail itself of the "relation back" doctrine in order to toll the applicable statute of limitations. According to the motion, Department Staff purposely refrained from serving Respondent Weinberg earlier in this action, thus denying him a hearing "within a reasonable time," as mandated by Section 301 of the State Administrative Procedure Act ("SAPA"). The motion states that Department Staff was aware of the alleged SPDES violations at some point prior to March 1997, when this action first began, and Department Staff was aware of the alleged violations of ECL Article 23 "since at least November 1995," when Department Staff directed that Respondents file an application for an ECL Article 23 permit because of alleged expansion of the underground storage caverns at the Facility.

Respondent Weinberg argues that the relation-back doctrine is inapplicable here, citing to Brock v. Bua, 83 A.D.2d 61, 70-71 (2nd Dept. 1981). According to the motion, Department Staff cannot satisfy the three-part test articulated in Brock to determine whether an amendment to include a new party is time-barred, or should be permitted to "relate back" to the original commencement of an action. That test provides that a claim asserted against a new party will relate back to the date upon which the claim was brought against the original defendants, provided that (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is "united in interest" with the original defendant, and thus was on notice of the action such that the new party is not prejudiced in defending on the merits; and (3) the new party knew or should have known that, but for plaintiff's excusable mistake as to the identity of the proper parties, the action would have been brought against the new party as well. Subsequently, the modified the test, determining that the mistake need not be "excusable" for plaintiff to satisfy the third element. Buran v. Coupal, 87 N.Y.2d 173, 180 (1995).

Respondent Weinberg contends that Department Staff has not established that there is any "unity of interest" between him and the Corporate Respondents. According to the motion, the 2003 Amended Complaint contains no allegation of specific wrongdoing by Respondent Weinberg personally, but instead relies upon his position as a corporate officer of both BPSI and EIL to establish vicarious liability. Respondent Weinberg maintains that the 2003 Amended Complaint contains no allegations sufficient to establish the requisite unity of interest, such that he "can be charged with notice of the action so that he will not be prejudiced in his ability to defend himself on the merits." Motion, at p. 13. The motion goes on to argue that the defenses available to the Corporate Respondents differ from those that Respondent Weinberg would likely assert, which he contends lends further support to the argument that the Respondents are not united in interest.

According to the motion, Department Staff's failure to add Respondent Weinberg earlier in this action is not the result of any mistake, but rather, was a strategic decision by Department Staff, despite the fact that "Mr. Weinberg has been the main point of contact between BPSI, the sole owner of the facility since 1983, and the Department for nearly two decades." Motion, at p. 14. Accordingly, Respondent Weinberg takes the position that Department Staff cannot satisfy either the second or third part of the test, and thus cannot invoke the "relation back" doctrine.

As a consequence, according to Respondent Weinberg, the appropriate inquiry is whether he has been afforded a hearing "within a reasonable time," pursuant to SAPA Section 301. The motion argues that he has not, to his detriment, because his defense has been substantially prejudiced by Department Staff's delay. In support of this contention, Respondent Weinberg points out that Charles Austin, a manager at the Facility whose testimony "would have been crucial" to Respondent Weinberg's defense in this action, died in or about August 1999. Motion, at p. 17. The motion states further that documents have been lost or destroyed over time, and that three senior employees have also retired, and that Respondents no longer have control over these potential witnesses.

Department Staff asserts that the delay in serving the 2003 Amended Complaint upon Respondent Weinberg does not violate SAPA, which is the applicable standard. According to Department Staff, much of the delay in these proceedings is attributable to the corporate Respondents, and because the corporate Respondents are controlled by Respondent Weinberg, there has been no substantial prejudice to him as a result of the time that has elapsed in serving the amending the complaint. In support of its argument, Department Staff points out that Respondent Weinberg has been on notice since service of the original complaint of the allegations, and on notice since 2000 of Department Staff's intention to add him as a respondent. Department Staff also argues that the significant public interest in enforcing the state's environmental law and regulations must be considered in assessing whether the administrative delay in these proceedings is reasonable.

Respondent Weinberg's motion goes on to argue that Department Staff is limited to a five year "look back" on penalties, citing to 28 U.S.C. Section 2462 of the federal Clean Water Act, and to State v. PVS Chemicals, Inc., 50 F. Supp.2d 171, 183 (W.D.N.Y. 1998). According to Respondent Weinberg, PVS Chemicals stands for the proposition that the five-year statute of limitations in the federal statute applies to prosecutions of SPDES permit violations under State law. In its opposition, Department Staff counters that the federal statute of limitations does not apply to this action, and points out that penalties are sought in this action pursuant to the ECL, not the Clean Water Act.

Finally, Respondent Weinberg moves to strike the allegations in the 2003 Amended Complaint referring to joint and several liability, arguing that the imposition of such liability "necessarily depends upon a showing that the person somehow participated in, authorized or ratified the tortious act – it cannot merely be presumed based upon a corporate relationship." Motion, at p. 19. The motion also points out that the various enforcement provisions referenced in the 2003 Amended Complaint do not, by their terms, impose joint and several liability. In its

opposition, Department Staff cites to a number of enforcement proceedings in which joint and several liability was imposed.

By letter dated December 12, 2003, Respondent Weinberg sought permission to reply. That reply, which is considered in this ruling, asserts that Department Staff's opposition confused the amendment of a complaint with service of amended process on a newly-added party. Respondent Weinberg argues further that the "reasonable time" pursuant to SAPA is to be measured from the day of the incident that prompted the agency action, citing to Walia v. Axelrod, 120 Misc.2d 104 (N.Y. Sup. Ct. 1983), reversed on other grounds, Matter of Axelrod, 103 A.D.2d 1007 (4th Dept. 1984). Respondent Weinberg points out that Department Staff failed to serve the 2003 Amended Complaint for almost four years, and asserts that Mr. Austin's unavailability and the resulting prejudice to Respondent Weinberg's defense is a consequence of Department Staff's failure to timely prosecute this action.

By letter dated March 8, 2004, Respondent Weinberg provided a citation to supplemental authority (State v. Tang, 2004 WL 192983 (Ill. App. Ct. Feb. 2, 2004), in which the Illinois Appellate Court found insufficient an amended complaint filed by the State Attorney General. That complaint sought to impose personal liability for violations of State environmental statutes upon the chief executive officer of a corporation. According to the court, a plaintiff must allege more than corporate wrongdoing in order to state a claim for personal liability. Rather, facts must be alleged "establishing that the corporate officer had personal involvement or active participation in the acts resulting in liability, not just that he had personal involvement or active participation in the management of the corporation." Tang, 2004 Ill. App. at *26.

By letter dated March 5, 2004, Department Staff responded to Respondent Weinberg's submission. That response is considered here. Department Staff argues that an Illinois decision is not controlling precedent in this case, and distinguishes the 2003 Amended Complaint from the complaint at issue in Tang, noting that the 2003 Amended Complaint alleges that Respondent Weinberg exercises direct control over the Corporate Respondents' operations. This, Department Staff asserts, is sufficient to meet the standard articulated in People ex rel. Burris v. C.J.R. Processing, Inc., 269 Ill. App.3d 1013, 1015 (1995), which Department Staff points out was relied upon by the court in Tang.

DISCUSSION

Jurisdiction Over Respondent

Service of the 2003 Amended Complaint upon Respondent Weinberg was properly effected. The October 23, 2003 ruling required service "by ordinary mail." This direction contemplated that service would be effected by mailing on or before November 17, 2003. Any arguable deficiency in this service was cured by Department Staff's additional service by certified mail upon Respondent Weinberg, as evidenced by the Schwartz Affidavit.

Moreover, Respondent Weinberg's arguments with respect to the CPLR's 120-day

service requirement are inapposite. Section 306-b of the CPLR requires service of a summons and complaint within 120 days after filing. The 2003 Amended Complaint was filed with OHMS on November 17, 2003, the date that it was served by mail and certified mail upon Respondent. The receipt for certified mail is dated November 19, 2003. Thus, service was completed within the 120-day period. As a result, it is not necessary to consider whether the "relation back" doctrine is applicable here.

In addition, CPLR 306-b provides two alternative grounds to extend the time for service, if necessary. First, the rule provides for an extension where the plaintiff shows good cause for the failure to effect service, and also authorizes a second basis for extension within the discretion of the court "in the interest of justice." This second basis to extend the time for service "requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105 (2001).

In Leader, the Court of Appeals considered a legal malpractice action, where the defendants argued that under either standard, a plaintiff must show reasonable diligence in attempting to effect service as a prerequisite to the court's exercise of discretion in extending the time for service. Id. at 103-04. The court disagreed, holding that a showing of reasonable diligence is only one of many relevant factors, "including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant." Id. at 105-06. The Court concluded that "[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." Id. at 105.

Analyzing the facts and balancing the competing interests of this case compels the conclusion that this motion should not be granted. Respondent Weinberg has been on notice of his potential involvement in this action for a number of years. See Matter of E.I.L. Petroleum, Inc., 2000 WL 33340964, *7 (Ruling, March 27, 2000) (ALJ ruled that there was no prejudice to Respondent in amending the complaint "as Mr. Weinberg has had notice of the proceedings thus far"). While Department Staff bears some responsibility for allowing this enforcement proceeding to languish, the corporate Respondents and Mr. Weinberg have also contributed to the delay. Moreover, Department Staff's motion survived the corporate Respondents' motion for summary judgment, which lends support to the conclusion that Department Staff's case is not frivolous. Finally, as noted in a prior ruling in this case, Respondent Weinberg's arguments as to prejudice are more appropriately considered in the context of an affirmative defense. Matter of Bath Petroleum, Inc., 2003 WL 22456078, *3 (Ruling, Oct. 23, 2003). Whether the delays associated with this action since its inception resulted in prejudice to any of these Respondents is a question of fact that should be developed in a hearing.

Timeliness of the 2003 Amended Complaint

Pursuant to Section 301(1) of SAPA, the Department has a statutory duty to afford a respondent an opportunity for a hearing within a reasonable time. In Matter of Cortlandt Nursing Home v. Axelrod, the court articulated the test to be used in determining whether such an opportunity has been provided. 66 N.Y.2d 169, 178 (1985). The Cortlandt test requires "[a]n administrative body in the first instance, and the judiciary sitting in review," to weigh (1) the nature of the private interest allegedly compromised by delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation. Id. "The determination of what constitutes a 'reasonable time' within the meaning of SAPA § 301(1) must be made on a case-by-case basis by weighing the foregoing factors." Matter of Lawrence, 1988 WL 158347, *4 (Ruling, Oct. 3, 1988). In Louis Harris and Assocs., Inc. v. DeLeon, 84 N.Y.2d 698 (1994), the Court of Appeals cited to Matter of Cortlandt, among other cases, in noting that "[w]e, however, have previously rejected the claim that lapse of time in rendering an administrative determination can, standing alone, constitute prejudice as a matter of law." Id. at 702.

In Matter of Lawrence, the ALJ considered the method to be employed in calculating the time that elapsed before the respondent was afforded an opportunity for a hearing, and concluded that "[i]n an enforcement proceeding before the Department of Environmental Conservation, the relevant period would normally begin at the time of the commission of the alleged violation." Id., at *3. The Commissioner's Decision and Order in Lawrence concluded that, "taking the totality of the circumstances of this case into account, the filing of the charges roughly three and one-half years from the time of the alleged violation is not inconsistent" with SAPA's requirement that a hearing be held within a reasonable time, despite a recommendation by the ALJ that the charges be dismissed due to the delay. Id. at *1. This was based upon the Commissioner's determination that respondent had not been prejudiced, and that the delay was not unreasonable "in the context of the conduct of the business of an administrative agency." Id.

Accordingly, the fact that almost four years elapsed since Department Staff was granted leave to amend and service was effected on Respondent Weinberg is not, standing alone, sufficient to establish that Respondent Weinberg has actually been prejudiced in his defense of this action. Both parties in this case share some responsibility for the length of time that this enforcement action has been pending, but if there is substantial, actual prejudice resulting from that delay, the appropriate course is to take that into consideration as part of a hearing. In Matter of Ward, 1997 WL 33135547 (Ruling, Dec. 17, 1997), respondents opposed Department Staff's motion to amend the complaint, and cross-moved for an immediate hearing on their first affirmative defense, which asserted that respondents had been substantially prejudiced by Department Staff's failure to timely prosecute an enforcement action. The ALJ concluded that the defense should not be dismissed, because "the issue of prejudice cannot be decided on the parties' written submissions. It requires a fact-finding hearing with an opportunity for cross-examination of witnesses who could prove what prejudice occurred here." Id., at *5. The same reasoning applies to this motion, where the prejudice, if any, to Respondent Weinberg may be raised as an affirmative defense.

Moreover, even if substantial prejudice results from delay in scheduling a hearing, the Commissioner is not divested of jurisdiction. Geary v. Commissioner of Motor Vehicles, 59 N.Y.2d 950, 951 (1983) (pointing out that "[i]n such circumstance, there would have been 'at most an "erroneous exercise of authority"' since the delay would not deprive the commissioner of jurisdiction); Wildman v. Axelrod, 106 A.D.2d 875, 875 (4th Dept. 1984) (noting that in these circumstances the petitioner must first seek administrative relief before judicial review is available) (citations omitted).

Respondent Weinberg's motion cites to the portion of the Cortlandt opinion where the court observed that "where delay obtains by reason of an agency's departure from its governing procedural regulations, the administrative process may be stripped of the presumption of regularity." Id. at 181 (citations omitted). Respondent Weinberg contends that Department Staff intentionally withheld service of the amended process for almost four years, and as a result, this action is devoid of any presumption of regularity, citing to Utica Cheese, Inc. v. Barber, 73 A.D.2d 726 (3rd Dept. 1979), aff'd, 49 N.Y.2d 1028 (1980). Utica Cheese, which concerns an application for a milk dealer's license, not an enforcement proceeding, is factually distinguishable, and is inapposite.

In arguing that his ability to mount a defense has been prejudiced, Respondent Weinberg points out that Charles Austin, a former employee of the Facility who is now deceased, will be unavailable to testify. Department Staff disputes these assertions, pointing out that Respondent Weinberg was in a position to preserve Mr. Austin's testimony if necessary. Again, the parties' contentions concerning their respective obligations, if any, to preserve Mr. Austin's testimony and any prejudice resulting from the failure to do so should be considered during the hearing on this matter. In that regard, at least one court has concluded that the obligation to ensure that testimony is preserved does not rest solely with the plaintiff. See Murcia v. County of Orange, 185 F. Supp.2d 290, 292 (S.D.N.Y. 2002) (in civil rights claim, plaintiff had no obligation to preserve testimony of witness who had died, noting that if defendant County wished to preserve the witness's testimony for any purpose, "the County should have deposed him, especially once this Court invited plaintiff to move for leave to amend").

Finally, Respondent Weinberg's arguments concerning the applicability of the five-year statute of limitations pursuant to the citizen suit provision of the Clean Water Act are not persuasive. Respondent Weinberg's motion cites to State v. PVS Chemicals, Inc., 50 F. Supp.2d 171, 183 (W.D.N.Y. 1998) for the proposition that the federal statute precludes consideration of any of the SPDES violations alleged in the 2003 Amended Complaint against Respondent Weinberg that took place more than five years before he was served. That action was brought by the State of New York pursuant to the citizen suit provisions of the Clean Water Act, 33 U.S.C. Section 1645, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Section 6972, which authorize citizens, or a State *parens patriae* on behalf of its residents, to bring suit for violations of the Acts in the absence of State or federal enforcement action.

Respondent Weinberg's reliance on this case and others cited in the motion papers is misplaced. Those cases considered actions brought pursuant to federal law. The 2003 Amended

Complaint alleges violations of the ECL, not the Clean Water Act. In PVS Chemicals, the court noted that the five-year statute of limitations pursuant to 28 U.S.C. Section 2462 applied to Clean Water Act claims "for statutory civil penalties." Id. at 176. Similarly, the court in Friends of the Earth v. Facet Enter., Inc., 618 F. Supp. 532, 536 (W.D.N.Y. 1984) held that "because this is an action for federal statutory civil penalties," the five-year statute of limitations applied to a citizen suit brought by two environmental groups against a manufacturer for violations of the Clean Water Act. As the 2003 Amended Complaint does not seek relief statutory civil penalties under that provision of federal law, the imposition of the federal five-year statute of limitations is not appropriate in this action.

Joint and Several Liability

Department Staff's allegations as to the joint and several liability of the Respondents will not be stricken. Instead, Respondent Weinberg's arguments to the contrary may be asserted in his Answer, and heard as affirmative defenses to the 2003 Amended Complaint. Department Staff will have the burden of proof with respect to these allegations.

The cases Department Staff cites in opposition to the motion are consistent with this approach. As Respondent Weinberg correctly notes, joint and several liability was imposed in each instance following a hearing.[2] Nevertheless, it does not follow that the allegations of joint and several liability in Department Staff's complaint must be stricken at this stage. Instead, these allegations will be considered during the hearing. Moreover, Respondent Weinberg's reliance on ALJ Goldberger's March 27, 2000 ruling in this matter is misplaced. That ruling stated simply that a finding of liability, if any, of the corporate Respondents and Respondent Weinberg would require a demonstration by Department Staff that each Respondent was directly involved, either as an owner or operator, in the alleged violations. Matter of E.I.L. Petroleum, Inc., 2000 WL 33340964, *6 (Ruling, Mar. 27, 2000). The March 27, 2000 ruling does not, as Respondent Weinberg argues, preclude a finding of joint and several liability following a hearing.

Finally, the Illinois case cited by Respondent Weinberg is distinguishable on the basis asserted by Department Staff. The 2003 Amended Complaint does, in fact, contain allegations that Respondent Weinberg exercises direct control over the Corporate Respondents' operations, and that the Respondents, collectively, are responsible for the claimed violations. Accordingly,

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[2] Matter of Palumbo Block Co., Inc., 2000 WL 1622944, *7 (Order, Oct. 5, 2000) (finding corporate and individual defendants liable after hearing); Matter of Mudd's Vineyard, Ltd., 1999 WL 167551, *1 (Order, Jan. 19, 1999) (penalty assessed after hearing against individual and corporate respondent); Matter of Oil Co., Inc., 1998 WL 799668, * 1 (Order, July 9, 1998) (corporate and individual respondents were jointly and severally liable based upon ALJ's findings after hearing); Matter of Harter, 1995 WL 14154, *1 (Order, Jan. 4, 1995) (individual held jointly and severally liable with corporate respondent); Matter of Mt. Hope Asphalt Corp., 1995 WL 582478, *2 (Order, Sept. 7, 1995); Matter of Pelbamar Corp., 1995 WL 775068 (Order, Nov. 30, 1995); Matter of Morgan Oil Terminals Corp., 1994 WL 736212, *2 (Order, Oct. 17, 1994) (joint and several liability imposed where findings demonstrated that corporate officer "was president and otherwise had such authority and responsibility to prevent the violations committed by the corporate Respondents."); Matter of PGS Carting Co., Inc., 1994 WL 734543, *1 (Order, Nov. 21, 1994); Matter of Ten Mile River Holding, Ltd., 1992 WL 290006, *1-2 (Order, Sept. 28, 1992).

Tang does not compel the conclusion that the 2003 Amended Complaint fails to allege facts sufficient to survive Respondent Weinberg's motion for summary relief. As noted above, the Tang court relied upon People ex rel. Burris v. C.J.R. Processing, Inc., in which the court analyzed whether the plaintiff's complaint alleged facts sufficient to hold the president of the defendant corporation personally liable for the corporation's violations of the Illinois Environmental Protection Act. The court concluded that corporate officers could be held liable for their personal involvement or active participation in such violations. 269 Ill. App.3d at 1018. The court further determined that because the complaint alleged that the president was personally involved in the decisions and corporate activities which caused the violations to occur, the allegations of the complaint adequately stated a cause of action against the president. Id. Because the 2003 Amended Complaint alleges direct control by Respondent Weinberg, summary relief cannot be granted.

On a motion to dismiss, a complaint must be liberally construed, and the trier of fact must accept as true the facts alleged in the complaint and any submissions in opposition to the motion. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002) (noting that the court will "accord plaintiffs the benefit of every possible favorable inference.") (citations omitted). The allegations in the 2003 Amended Complaint must be taken as true, and viewed in the light most favorable to Department Staff. Considered in that light, the allegations are sufficient to survive Respondent Weinberg's motion to dismiss. Accordingly, the motion is denied.

SCHEDULING ORDER

1. Respondent Weinberg shall serve his answer to the 2003 Amended Complaint on or before April 16, 2004.

2. Respondent Weinberg shall respond to Department Staff's document demands on or before May 21, 2004.

3. The deadline to complete discovery is extended to June 11, 2004. On that same date, the parties will serve a list of the witnesses each party intends to call at the hearing on this matter, as well as a statement of the witnesses' qualifications.

4. Department Staff will file a statement of readiness, pursuant to Section 622.9, upon the completion of discovery and any further settlement discussions.

/s/
Maria E. Villa
Administrative Law Judge

Dated: March 18, 2004
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List