

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged
Violations of the New York State
Environmental Conservation Law
Article 33 and Part 325 of Title 6 of
the Official Compilation of Codes,
Rules, and Regulations of the State
of New York

RULING ON DEFAULT MOTION

DEC #R7-20100114-4

-by-

LAWRENCE BELGE, PRESIDENT
COMMERCIAL LAWN AND LANDSCAPES, INC.,

September 27, 2010

Respondent.

SUMMARY

This ruling denies a motion made by staff of the Department of Environmental Conservation (DEC staff) for a default judgment and order. DEC staff has failed to show that it is entitled to a default because it has not shown that respondent Lawrence Belge failed to timely serve an answer. The parties will be contacted shortly to schedule an administrative enforcement hearing in this matter.

PROCEEDINGS

By notice of hearing and complaint¹ dated June 16, 2010, DEC staff commenced this enforcement action against respondent Lawrence Belge. The complaint alleged two causes of action. First, DEC staff allege that Mr. Belge violated Environmental Conservation Law (ECL) § 33-1001 and 6 NYCRR 325.40(a)(4)(ii) by failing to enter a written commercial lawn care contract prior to commercial lawn pesticide application. Specifically, DEC staff allege that he failed to supply warning labels in 12-point

¹The captions on these two documents are not the same. The notice of hearing identifies the respondent as Lawrence Belge, DBA RBX Enterprises Ltd, Commercial Lawn and Landscapes, Inc. with a case number of R7-20100504-29. The complaint identifies the respondent as Lawrence Belge, President, Commercial Lawn and Landscapes, Inc. with a case number of R7-20100114-4.

type. Second, the complaint alleges that Mr. Belge violated ECL 33-1205 and 6 NYCRR 325.25(a) by failing to maintain true and accurate records of pesticide applications. Specifically, DEC staff allege that he failed to maintain records of the EPA registration number and pesticide name.

The notice of hearing and complaint were served by certified mail return receipt requested the following day, June 17, 2010. Nothing in the record indicates that DEC Staff sent a courtesy copy of the notice of hearing and complaint to the attorneys who represented Mr. Belge in another pesticide enforcement matter (DEC #R7-20080513-41) which was resolved by consent order in August 2008.

DEC's administrative hearing regulations require the service of an answer within twenty days of receiving the notice of hearing and complaint (6 NYCRR 622.4[a]). Service of the answer is considered complete upon mailing (see 6 NYCRR 622.6[a][1]; CPLR 2103[b][2]), which is defined as placing it in a first class postpaid wrapper and putting it in the care and custody of the United States Postal Service (CPLR 2103[f][1]).

The time for Mr. Belge to answer the complaint expired on July 7, 2010 and no formal answer was received. He did send an undated, written communication to DEC staff which DEC staff counsel states she received on July 14, 2010. Counsel does not include the envelope or any other proof that Mr. Belge's submission was not timely mailed.

The notice of hearing also stated that a prehearing conference was scheduled for June 30, 2010. DEC staff contends that Mr. Belge did not attend this prehearing conference and he does not contest this allegation. In its papers, DEC staff does not move for a default based on Mr. Belge's failure to appear at the pre-hearing conference. Nor could the non-appearance be considered a default in this case because the prehearing conference scheduled for June 30, 2010, fell within the 20-day period Mr. Belge had to answer the complaint. Because a respondent is afforded the full regulatory period within which to answer, the failure to appear at a pre-answer, pre-hearing conference should not be used as a basis for a default judgment against respondent (Matter of Kuldeep Singh, Decision and Order of the Commissioner, December 17, 2003).

By motion² dated July 15, 2010, DEC staff moved for a default order and judgment based on Mr. Belge's failure to timely answer. Mr. Belge was served with a copy of the motion and has not responded.

DISCUSSION

According to the complaint, the alleged violations were discovered during an inspection by an unidentified DEC staff member of respondent Belge's business records on November 5, 2009. Following this inspection, DEC staff mailed a consent order to Mr. Belge on January 22, 2010, in an attempt to resolve the violations, but he failed to sign and return it.

DEC staff then served the notice of hearing and complaint on June 17, 2010. However, DEC staff has failed to show that it is entitled to a default in this matter. DEC staff claims that Mr. Belge failed to timely answer as required by July 7, 2010, and states that his response was received on July 14, 2010. However, DEC staff does not include proof that Mr. Belge did not timely mail his response. The fact that DEC staff counsel did not receive the response until July 14, 2010 is not proof that it was not mailed by July 7, 2010.

In this case, where the respondent is appearing *pro se*, Mr. Belge's submission should be considered an answer. It begins with the caption (which is different than the three versions found in DEC Staff's papers). It is signed by respondent, as required (6 NYCRR 622.4[a]). While Mr. Belge does not specifically deny the two causes of action in his submission, with respect to the second cause of action, he does state that he had previously shown a copy of the contract he used to a DEC staff member and that she had approved it. He also challenges the amount of the civil penalty sought and seeks a smaller fine and possibly a payment scheduled.

Based on the above, DEC staff has failed to show that it is entitled to a default judgment and order. Even if it could be shown that Mr. Belge's answer was a few days late, in this case

² A third version of the caption is found on the motion, which lists the respondent as Lawrence Belge d/b/a Commercial Lawn and Landscapes, Inc. with a case number of R7-20100114-4.

it would be fair for the ALJ to extend Mr. Belge's time to answer, as authorized by 6 NYCRR 622.4(a).

RULING

DEC staff's motion for a default judgment and order is denied. Respondent, appearing *pro se*, filed what should be considered an answer, and DEC staff has failed to demonstrate that this answer was not timely filed. Even if DEC staff could prove that the answer was mailed less than a week late, given the facts in this case, including Mr. Belge appearing *pro se* and DEC staff's failure to send a courtesy copy of the notice of hearing and complaint to the attorneys who recently represented Mr. Belge, I would extend the Mr. Belge's time to answer pursuant to 6 NYCRR 622.4(a). The parties will be contacted shortly to schedule an administrative enforcement hearing in this matter.

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

September 27, 2010
Albany, NY