STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

BELLMONT L.M. INC. and ANDREW B. CHASE, Individually,

Respondents.

RULING ON MOTION FOR PERMISSION TO USE ALTERNATIVE METHOD OF SERVICE

DEC Case No. R5-20170301-2241
PBS No. 5-462969

October 6, 2017

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Scott Abrahamson, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation

-- No appearance for respondents

Staff of the Department of Environmental Conservation moves for permission to use an alternative method of serving the notice of hearing and complaint in this matter upon respondent Andrew B. Chase, individually. For the reasons that follow, staff's motion is granted.

I. Proceedings

Department staff commenced this proceeding as against respondent Bellmont L.M. Inc. by personally serving the New York State Secretary of State with the notice of hearing and complaint in this matter on May 17, 2017 (see Affirmation of Scott Abrahamson, Esq., dated Aug. 16, 2017 [First Affirm], at 1). On May 18, 2017, staff served the additional notice required by CPLR 3215(g)(4) on respondent Bellmont by mailing the notice of hearing and complaint to the corporation, in care of Mr. Andrew B. Chase, at P.O. Box 315, Lyon Mountain, New York 12952, by first class mail (see id.; see also id., Exh 1 [affidavit of mailing]; see also Matter of Milu, Order of the

Commissioner, May 25, 2007, at 1). The package containing the CPLR 3215(g)(4) notice was not returned to the Department's Region 5 offices (see First Affirm at 2).

Department staff also sent two duplicate notices of hearing and complaints to respondent Andrew B. Chase, in his individual capacity, by certified mail. Staff mailed one set of papers to P.O. Box 315, Lyon Mountain, New York 12952, and a second set of papers to 14 Klein Strasse, Ellenburg Depot, New York 12935 (see id. at 2). Staff obtained the addresses from a facility information report. The certified mailing to P.O. Box 315, however, was returned by the United States Postal Service marked "unclaimed." The second certified mailing to the Klein Strasse address was returned marked "no mail receptacle." (Id.; id., Exh 2.)

The notice of hearing directed respondents to attend a pre-hearing conference at the Department's Warrensburg office on June 22, 2017 (see id. at 2). On June 22, staff counsel received a telephone call at his Ray Brook office from respondent Chase, who was waiting at the Warrensburg office for the pre-hearing conference. Respondent Chase indicated that he received the notice of hearing and complaint and was at the Warrensburg office "to defend his company at a hearing" (id.). Respondent Chase further stated that he no longer lived in New York, that he was living "full time" in Florida, and that he had flown from Florida to New York to defend his company (id.).

Staff counsel conducted the pre-hearing conference by telephone. During the conference, staff extended the deadline for serving an answer (see id.). Staff also asked respondent Chase for his mailing address in Florida, but respondent evaded the request (see id. at 3).

On July 18, 2017, staff counsel sent an email to an email address provided by respondent Chase forwarding a copy of the notice of hearing and complaint (see id., Exh 3). Staff stated that respondent could submit an answer by email, but staff still requested that respondent provide a valid mailing address (see id.). On July 23, 2017, respondent Chase sent an answer on behalf of respondent Bellmont by email. In the answer, respondent stated

> "#4. Bellmont Corporation LM is no longer a corporation in the state of new York

> "#5. mailing address is PO box 315 Lyon Mountain, but I do not physically reside at 14 Kline Strasse Lyon mountain ny 12952"

(id.). Respondent Chase did not provide any other mailing address (see id.).

Department staff conducted multiple online searches using Westlaw and a Lee County, Florida, website for any other addresses in New York or Florida associated with respondent Chase, but found none that appeared to be current or reliable (see First Affirm at 3; Affirmation # 2 of Scott Abrahamson, Esq., dated Aug. 30, 2017 [Second Affirm], at 2-3).

Under cover letter dated August 17, 2017, Department staff filed an ex parte motion seeking permission to use an alternative method of serving the notice of hearing and complaint upon respondent Chase individually in this proceeding, namely by first class mail to the P.O. Box 315 address. In support of the motion, staff filed the first affirmation of Mr. Abrahamson with three exhibits. In supplemental papers dated August 30, 2017, staff also seeks permission to serve respondent Chase by email at the email address provided by respondent. The supplemental papers consist of a cover letter dated August 30, 2017, and the second affirmation of Mr. Abrahamson with two exhibits.

II. Discussion

The Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]) provide that service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]). The regulations further provide that "[i]f personal service and service by certified mail is impracticable, upon application by the staff the [Administrative Law Judge (ALJ)] may provide for an alternative method of service consistent with CPLR section 308.5" (id.).[1]

CPLR 308 provides that service of process on a natural person may be effected: (1) by personal service within the State

[1] Prior to appointment of an ALJ to hear a particular case, the Chief ALJ is authorized to rule on pre-assignment motions (see 6 NYCRR 622.6[d]).

(personal delivery); (2) by delivery to "a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" followed by first class mailing to the person's last known residence or actual place of business ("deliver and mail" service); or by service on a designated agent (see CPLR 308[1], [2], and [3]). Where service by personal delivery or "deliver and mail" service cannot be made with "due diligence," service of process may be effected by affixing process to the door of the actual place of business, dwelling place or usual place of abode of the person to be served followed by first class mailing to the person's last known residence or actual place of business ("nail and mail" service) (see CPLR 308[4]). CPLR 313 provides that a person subject to the jurisdiction of the court may be served process outside the State in the same manner as process is served within the State.

CPLR 308(5) provides that if service by personal delivery, "deliver and mail" service, or "nail and mail" service is "impracticable," personal service may be made "in such a manner as the court, upon motion without notice, directs." Although a showing of impracticality does not require a showing of due diligence or actual attempts to serve a party under every method prescribed in CPLR 308, the movant is required to make a competent showing of the actual prior efforts that were made to effect service (see Markoff v South Nassau Community Hosp., 61 NY2d 283, 287 n 2 [1984]; Oglesby v Barragan, 135 AD3d 1215, 1216 [3d Dept 2016]; Cooper-Fry v Kolket, 245 AD2d 846, 847 [3d Dept 1997]). A movant can demonstrate that service by conventional means is impracticable by making a diligent search for information regarding a respondent's current residence, business address, or place of abode, even if such a search ultimately proves unsuccessful (see Franklin v Winard, 189 AD2d 717 [1st Dept 1993]).

In this proceeding, Department staff has made a competent showing that personal service on respondent Chase is impracticable. During the June 2017 telephone conversation, respondent Chase stated that he no longer lived in New York and, instead, was living full time in Florida. In respondent Bellmont's answer, respondent Chase stated that he does not physically reside at the 14 Klein Strasse address. Department staff documented its diligent efforts to obtain a valid address for respondent Chase in either New York and Florida, but the search failed to reveal any current addresses for Chase other

than the P.O. Box 315 address. Without a current physical address for respondent Chase's place of business, dwelling place, or usual place of abode in either New York or Florida, service of the notice of hearing and complaint by personal delivery, deliver and mail service, or nail and mail service is impracticable.

Department staff has also demonstrated that service by certified mail is impracticable. The only current address the Department has for respondent Chase is the P.O. Box 315 address. However, the certified mailing to the P.O. Box 315 address was return "unclaimed," and nothing in the record indicates that any further certified mailings to the P.O. box would be successfully delivered to respondent. Moreover, as noted above, a diligent search for respondent Chase's current address has failed to reveal a physical address in either New York or Florida to which a certified mailing might be successfully delivered. Accordingly, staff has demonstrated that service by certified mail is also impracticable.

Once the impracticability standard is satisfied, due process requires that the method of alternative service authorized be "`reasonably calculated, under all the circumstances, to apprise'" respondent of the proceeding brought against him (Dobkin v Chapman, 21 NY2d 490, 505 [1968] [quoting Mullane v Central Hanover Bank & Trust Co., 339 US 306, 314 (1950)]). Applying this standard, courts have approved service of process by first class mailing when the defendant himself had provided his last address of record (see e.g. id. at 505-506). Courts have also approved service of process by email as an appropriate alternative method when the statutory methods have proven ineffective (see e.g. Safadjou v Mohammadi, 105 AD3d 1423, 1425-1426 [4th Dept 2013]; Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L., 78 AD3d 137, 141-142 [1st Dept 2010]; see also Snyder v Alternate Energy Inc., 19 Misc 3d 954 [Civ Ct, New York County 2008]; Hollow v Hollow, 193 Misc 2d 691 [Sup Ct, Oswego County 2002]).

Under the circumstances of this proceeding, I conclude that service of the notice of hearing and complaint on respondent Chase by email to respondent's email address and by first class mail to the P.O. Box 315 address provided by respondent is reasonably calculated to apprise respondent of the proceeding against him. The record demonstrates that respondent

Chase has not only received but responded to email sent by Department staff to the email address provided by respondent.

In addition, the record demonstrates that respondent Chase has received first class mail sent to the P.O. Box 315 address. During the June 22, 2017, telephone call, respondent Chase admitted that he received the notice of hearing and complaint sent to respondent Bellmont, and indicated that he had flown to New York from Florida to defend his company at hearing. It may be reasonably inferred that respondent Chase received the notice of hearing and complaint when he received the CPLR 3215(g)(4) notice sent to his attention by first class mail on May 18, 2017. Moreover, in the answer respondent Chase sent by email to Department staff on behalf of respondent Bellmont, respondent Chase indicated that the P.O. Box 315 address was a current mailing address. Accordingly, respondent Chase is reasonably likely to receive the notice of hearing and complaint if it is sent to him both by email to his email address, and by first class mail to the P.O. Box 315 address. Therefore, Department staff's motion for permission to use an alternative method of serving the notice of hearing and complaint on respondent Chase, individually, should be granted.[2]

III. Ruling

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Department staff's motion for permission to use an alternative method of serving the notice of hearing and complaint on respondent Andrew B. Chase, in his individual capacity, is granted.

II. Department staff shall send the notice of hearing and complaint by email to the email address used by respondent Chase for his July 23, 2017 email correspondence (see First Affirm, Exh 3). In its email transmitting the notice of hearing and complaint, Department staff shall indicate that the papers are being served on respondent Chase in his individual capacity.

[2] With respect to the first class mailing, I am adopting the procedures provided for in CPLR 308(2) and (4).

III. Department staff shall also send the notice of hearing and complaint by first class mail to respondent Chase at the P.O. Box 315 address in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns a proceeding against respondent.

IV. The emailing and first class mailing shall be effected within twenty days of each other. Proof of service shall be filed with my office within twenty days of either emailing or first class mailing, whichever is effected later. Service shall be complete ten days after such filing.

V. A copy of this ruling is to be included in both the emailing and first class mailing.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: October 6, 2017
Albany, New York