

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 15 and 25 of the New York State Environmental Conservation Law (“ECL”) and Parts 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

**RULING ON MOTION
FOR ORDER WITHOUT
HEARING**

DEC Case No.
R2-20090702-399

- by -

**BETTY BUILDERS INC.,
ELIZABETH MOLLOY,
FRANK MOLLOY,
526 YZNAGA CORPORATION,
SEAMUS CAREY, and CITY OF NEW
YORK DEPARTMENT OF SMALL BUSINESS
SERVICES,¹**

Respondents.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (James L. Simpson, Assistant Counsel, of counsel), for staff of the Department of Environmental Conservation.

- Sullivan PC (Peter Sullivan, Esq. of counsel), for respondents Betty Builders Inc., Elizabeth Molloy, Frank Molloy, 526 Yznaga Corporation, and Seamus Carey.

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) alleges that, Betty Builders Inc., Elizabeth Molloy, Frank Molloy, (Betty Builders Respondents), 526 Yznaga Corporation, and Seamus Carey (Betty Builders Respondents, 526 Yznaga Corporation and Seamus Carey are collectively referred to as respondents) violated articles 15 and 25 of the Environmental Conservation Law (ECL) and parts 608 and 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Department staff moves for an order without hearing, and respondents oppose. For the reasons that follow, Department staff’s motion is denied.

¹ By Stipulation and Order of dismissal dated July 8, 2019, the City of New York and its Department of Small Business Services were dismissed as respondents in this proceeding.

PROCEEDINGS

Department staff commenced this administrative enforcement proceeding by service on respondents of a notice of motion and a motion for order without hearing in lieu of complaint dated June 12, 2019 (*see* 6 NYCRR 622.12[a]). The motion was served on respondents by certified mail (*see* Affirmation of Service of James Simpson, Esq. dated June 28, 2019). In support of its motion, Department staff filed the following: an affirmation of James L. Simpson, Esq., Assistant Counsel, DEC Region 2, dated June 11, 2019; an affidavit of Matthew James, DEC Biologist 1, dated June 11, 2019; an attestation of Tim Ruhren, Manager of Information Technology Systems 1 for the NYS Office of Information Technology Services, dated May 14, 2019; an affidavit of Tamara Greco, DEC Deputy Regional Permit Administrator, dated May 9, 2019, and accompanying attachments, including photos.

In the motion, Department staff charges that respondents are owners of “certain lots in the Bronx, identified as Bronx County Tax Block 5611, Lots 49, 50, and 149 (the “Site”) that are within and under waters of the State and comprised entirely of tidal wetland and tidal wetland adjacent area and that respondents:

- i. do not have any permits from the Department to engage in regulated activity at this Site;
- ii. filled waters of the State, tidal wetlands and regulated tidal wetland adjacent areas;
- iii. constructed concrete block walls in waters of the State, tidal wetland, and regulated tidal wetland adjacent areas;
- iv. removed soil and other aggregate from tidal wetlands;
- v. constructed a commercial and industrial facility and are undertaking a commercial and industrial use in a tidal wetland and regulated adjacent area;
- vi. constructed accessory structures for the commercial and industrial facility in a tidal wetland and adjacent area;
- vii. are conducting regulated activity in a tidal wetland and regulated adjacent area that substantially alters or impairs the natural condition and function of the tidal wetlands;
- viii. constructed a riprap revetment in the waters of the State and regulated tidal wetlands.”

Department staff seeks an order of the Commissioner granting the motion and imposing a civil penalty on Betty Builders respondents, jointly and severally, in the amount of three hundred seventy-five thousand dollars (\$375,000), imposing a civil penalty on 526 Yznaga Corporation and Seamus Carey, jointly and severally, in the amount of seventy-five thousand dollars (\$75,000), requiring respondents to cease illegal activities, submit a plan to restore the tidal wetlands and adjacent area, and to remove all fill placed in waters of the State (*see* Motion for Order without Hearing at 4).

-

Respondents requested, and Department staff granted, an extension of time to respond to the motion. Respondents served and filed papers in opposition to staff's motion which included a memorandum of law dated July 26, 2019, and an affidavit of Sheldon Reich, Professional Engineer (PE), with an accompanying attachment, sworn to July 25, 2019.

In their response, respondents argue that the motion must be denied because the Department has failed to provide "any of the underlying data, maps, documents, analysis or training in cartography of digital geologic mapping necessary" to support the conclusory statements regarding the tidal wetland and tidal wetland adjacent area boundaries alleged in staff's affidavits (*see* Memorandum of Law in Opposition to the Motion at 2).

By letter dated July 31, 2019, Department staff requested leave to supplement their motion by submitting a copy of a United States Geological Services (USGS) topographical map detailing the elevation contour of 10 feet above sea level at the subject site for the purpose of establishing the tidal wetland adjacent boundary. Respondents objected to the request, arguing among other things, that there is no legal basis for staff's submission. By letter ruling dated August 5, 2019, I granted staff's request to submit the map and provided respondents with an opportunity to respond to the submission. On August 9, 2019, staff submitted a copy of the 1979 USGS topographical map accompanied by an attorney affirmation.

On August 27, 2019, respondents submitted an affidavit of Sheldon Reich, PE, and an attorney affirmation in opposition to the Department's use of the 1979 USGS topographical map to establish the tidal wetland adjacent area on the grounds that pursuant to 6 NYCRR 661.4(b)(1)(iii), staff should have utilized the 1966 USGS topographical map.

DISCUSSION

A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the causes of action or defenses are established sufficiently to warrant granting summary judgment under the CPLR in favor of any party (*see* 6 NYCRR 622.12[d]). The motion will be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing (*see* 6 NYCRR 622.12[e]).

Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (*see* *Cheeseman v Inserra Supermarkets, Inc.*, 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has made a prima facie showing, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (*Cheeseman*, 174 AD2d at 957-958).

A motion for order without hearing is served with "supporting affidavits reciting all the material facts and other available documentary evidence" (6 NYCRR 622.12[a]). Motions for order without hearing are governed by the same principles that govern summary judgment motions brought pursuant to CPLR 3212 (*see* 6 NYCRR 622.12[d]; *see also* *Matter of Richard*

Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003, at 3).

Upon a review of the papers submitted by Department staff as well as respondents, I conclude that respondents have presented sufficient evidence in their responsive papers to demonstrate that material facts are in question and therefore summary judgment is not appropriate.

Accordingly, Department staff's motion for order without hearing is denied. I direct Department staff to file a statement of readiness in accordance with 6 NYCRR 622.9 when it is ready to proceed to hearing.

_____/s/_____
Michele M. Stefanucci
Administrative Law Judge

Dated: Albany, New York
October 21, 2019