

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law (ECL) and Part 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), by

**RULING ON
STAFF'S MOTIONS**

DEC Case No.
CO3-20060426-3

Brewster Cleaners, Inc.,

Respondent.

Proceedings

Staff of the Department of Environmental Conservation (Department staff) served a notice of hearing and complaint, both dated May 23, 2007 upon Brewster Cleaners, Inc.; William Mangieri, Jr.; Noemi's Inc.; and ABM Industries, Inc. A copy of the May 23, 2007 complaint is attached to these rulings as Appendix A.

As originally drafted, the May 23, 2007 complaint identifies Brewster Cleaners, Inc., and no one else, as the Respondent, and asserts that Brewster Cleaners, Inc. owns and operates an existing perchloroethylene (perc) dry cleaning facility located at 993 State Route 22 in Brewster (Putnam County), New York. In four causes of action, the May 23, 2007 complaint alleges that Brewster Cleaners, Inc. violated various provisions of title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR) part 232 (Perchloroethylene Dry Cleaning Facilities). For these alleged violations, Department staff seeks a total civil penalty of \$3,500, and an order from the Commissioner directing Brewster Cleaners, Inc. to comply with the applicable requirements in 6 NYCRR part 232.

The May 23, 2007 notice of hearing advised Brewster Cleaners, Inc. that it must serve an answer within 20 days upon receipt of the complaint, and it also advised Brewster Cleaners, Inc. that Staff had scheduled a pre-hearing conference for 11:00 a.m. on June 29, 2007 at the Department's Region 3 Office in New Paltz, New York. The notice further advised Brewster Cleaners, Inc. that its failure either to answer the complaint or to appear at the pre-hearing conference would result in a default and a waiver of Brewster Cleaners, Inc.'s right to a hearing. Brewster Cleaners, Inc. neither filed any answer nor appeared at the June 29, 2007 pre-hearing conference.

With a cover letter dated July 13, 2007, Department staff filed two motions with the Office of Hearings and Mediation Services. Staff moves to amend the caption by changing the name of the Respondent from "Brewster Cleaners, Inc." to "ABM Industries, Inc. d/b/a Brewster Cleaners." In addition, Staff moves for a default judgment against ABM Industries, Inc. d/b/a Brewster Cleaners. The July 13, 2007 cover letter shows that Staff sent copies of the motions and supporting documents to ABM Industries, Inc. and to Brewster Cleaners, Inc. by regular mail. To date, the Office of Hearings and Mediation Services has not received any reply with respect to either motion.

Discussion

Staff's motions raise two issues. The first is whether Staff duly commenced an administrative enforcement proceeding against ABM Industries, Inc. For the reasons discussed below, Staff did not.

The second issue is whether Staff's request to amend the caption of the May 23, 2007 complaint is the appropriate procedure for obtaining personal jurisdiction over ABM Industries, Inc. As discussed below, it is not. Consequently, Staff has not obtained personal jurisdiction over ABM Industries, Inc. Therefore, Staff is not entitled to a default judgment against ABM Industries, Inc. at this time.

I. Commencement of a Proceeding

Department staff may commence an administrative enforcement proceeding such as the referenced matter with service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of the notice of hearing and the complaint must be by personal service consistent with the Civil Practice Rules and Regulations (CPLR), or by certified mail (see 6 NYCRR 622.3[a][3]). A business corporation may be served with a complaint in a manner consistent with the provisions outlined at Section 306 of the Business Corporation Law (see CPLR 311[a][1]).

Business Corporation Law § 306(b)(1) provides that service of process upon a domestic corporation may be made by personally delivering duplicate copies of the process to the New York State Secretary of State. The Secretary of State will then send one copy of the process to the corporation at the post office address on file with the Secretary by certified mail, return receipt requested. When service upon a corporation is made in this manner, service is complete when the Secretary of State is served.

The papers concerning Staff's motion to amend the caption, consist of an affirmation in support of the motion by Staff's counsel, Michael J. Derevlany, Esq., dated July 13, 2007 with attached Exhibits A, B, C, D, E and F. To commence this administrative enforcement proceeding, Department staff initially served Noemi's Inc. by hand delivering two copies of the May 23, 2007 notice of hearing and complaint to the New York State Department of State (DOS), Division of Corporations. In addition, Staff sent a copy of the notice of hearing and the complaint by certified mail, return receipt requested to Brewster Cleaners, Inc., at 993 State Route 22, Brewster, New York 10509-1526 (see Exhibit A to counsel's affirmation in support of Staff's motion to amend the caption), and to William Mangieri, Jr., Brewster Cleaners, Inc., 993 State Route 22, Brewster, New York 10509-1526 (see Exhibit B). Exhibit B also includes a receipt from the DOS Division of Corporations dated May 23, 2007 for service of Staff's notice of hearing and complaint upon Noemi's Inc.

Exhibit C is a copy of the information on file with the DOS Division of Corporations for Brewster Cleaners, Inc. According to this information, the current (as of May 23, 2007) entity name for Brewster Cleaners, Inc. is Noemi's Inc. The address that Noemi's Inc. provided on February 7, 1957 to the DOS Division of Corporations for process service is 62 Cottage Road, Carmel, New York 10512, and the chair or chief executive officer is identified as Noemi Bao at the same address.

Exhibit D is a copy of a letter dated May 31, 2007 from Noemi Bao to Mr. Derevlany. In this letter, Noemi Bao states that the assets of Brewster Cleaners, Inc. were sold on May 3, 2004 to ABM Industries, Inc., care of Anna and William Mangieri, 5901 Chelsea Cove North, Hopewell Junction, New York 12533. Based on the May 2004 sale of Brewster Cleaners, Inc., Noemi Bao states further that the Secretary of State sent Department staff's May 23, 2007 notice of hearing and the complaint to Noemi's Inc. in error.

According to counsel's affirmation in support of the motion to amend the caption, Department staff reviewed records on file with the DOS Division of Corporations to determine the address for ABM Industries, Inc. Exhibit E is a copy of the information on file with the DOS Division of Corporations for ABM Industries, Inc. For process service, the address for ABM Industries, Inc. is 5901 Chelsea Cove North, Hopewell Junction, New York 12533.

On May 30, 2007, Department staff served ABM Industries, Inc. with a copy of the May 23, 2007 notice of hearing and

complaint, as originally drafted (see Appendix A), by hand delivering two copies of these documents to the DOS Division of Corporations. Exhibit F is a copy of a receipt for service upon ABM Industries, Inc. dated May 30, 2007 from the DOS Division of Corporations. In an affidavit by Monica Hauck-Whealton sworn to July 13, 2007, Ms. Hauck-Whealton states that she hand delivered copies of the May 23, 2007 notice of hearing and the complaint to the Secretary of State (see Exhibit B to Staff's motion for default judgment).

I conclude, therefore, that Department staff commenced the captioned administrative enforcement action against Brewster Cleaners, Inc. with service of the May 23, 2007 notice of hearing and the complaint in a manner consistent with the requirements outlined at 6 NYCRR 622.3. Department staff, however, no longer appears to be interested in pursuing the charges alleged in the May 23, 2007 complaint against Brewster Cleaners, Inc. based on the information provided in Noemi Bao's May 31, 2007 letter (see Exhibit D).

Upon receipt of Noemi Bao's May 31, 2007 letter, Department staff attempted to include ABM Industries, Inc. into the captioned administrative enforcement action by serving the May 23, 2007 notice of hearing and complaint, as originally drafted, upon the Secretary of State pursuant to Business Corporation Law § 306(b)(1). As originally drafted, however, the May 23, 2007 complaint does not expressly identify ABM Industries, Inc. and Mr. Mangieri as Respondents (see Appendix A [Paragraphs 1 and 7]).

Although Noemi Bao's May 31, 2007 letter suggests that Mr. Mangieri may be a corporate officer of ABM Industries, Inc., the May 23, 2007 complaint does not contend what, if any, relationship exists among Brewster Cleaners, Inc., William Mangieri, Jr., Noemi's Inc., and ABM Industries, Inc.¹ In any event, Staff's motion papers show that ABM Industries, Inc. is a

¹ As noted above, Exhibit E to counsel's affirmation in support of the motion to amend the caption is a copy of the information on file with the DOS Division of Corporations for ABM Industries, Inc. For process service, the address for ABM Industries, Inc. is 5901 Chelsea Cove North, Hopewell Junction, New York 12533. The corporate information on file with the DOS Division of Corporations, however, does not identify Mr. Mangieri, or any one else, as a corporate officer for ABM Industries, Inc.

corporate entity separate from Brewster Cleaners, Inc., which explains why Staff has moved to amend the caption.

Finally, the May 23, 2007 complaint neither asserts that ABM Industries owns and operates the dry cleaning facility located at 993 State Route 22 in Brewster, New York, nor alleges that ABM Industries, Inc. violated any provisions of ECL article 19 and implementing regulations at 6 NYCRR part 232. Although Department staff has informed ABM Industries, Inc. and Mr. Mangieri of the captioned administrative enforcement action against Brewster Cleaners, Inc. by providing them with copies of the complaint, the May 23, 2007 complaint, as originally drafted, fails to provide ABM Industries, Inc. with adequate notice of the commencement of any administrative enforcement proceeding against it (see *Matter of Great Eastern Mall, Inc. v Condon*, 36 NY2d 544 [1975]).² In the absence of adequate notice, Staff has not commenced any proceeding against ABM Industries.

Because Department staff has not commenced any enforcement action against ABM Industries, Inc., Staff has not obtained personal jurisdiction over ABM Industries, Inc., and has not provided ABM Industries, Inc. with any notice of the charges alleged in the May 23, 2007 complaint.

II. Staff's Motion to Amend the Caption

Staff moves to amend the caption in this matter by modifying the manner in which the Respondent is identified in the May 23, 2007 notice of hearing and the complaint from "Brewster Cleaners, Inc.," as originally drafted (see Appendix A), to "ABM Industries, Inc. d/b/a Brewster Cleaners." Department staff's motion papers consist of an affirmation in support of the motion by counsel for Department staff, Michael J. Derevlany, Esq., dated July 13, 2007 with attached Exhibits A, B, C, D, E and F.

² Here, the Court outlines a two-pronged test to promote the concepts that the technical defects of pleadings should not defeat otherwise meritorious claims, and that substance is preferred over form. The first prong of the test is whether the entity which is the actual respondent, if not the formally named respondent, has received adequate notice of the commencement of the proceeding. The second prong of the test is whether any substantial right of this entity would be prejudiced by disregarding the defect or irregularity. (*Great Eastern Mall, Inc.*, 36 NY2d at 548-549).

Contrary to Staff's assertions, the motion to modify the caption of the May 23, 2007 complaint would result in a significant amendment. With this proposed amendment, Staff is attempting to obtain personal jurisdiction over a new Respondent (*i.e.*, ABM Industries, Inc.). The defects in the allegations asserted in the May 23, 2007 complaint are outlined above. The allegations of the complaint control over any error in the caption (*see Hillside Colony Inc. v Barbolt*, 86 Misc. 2d 20, 25 [1976]). Therefore, amending only the caption will not cure the personal jurisdiction defect. Rather, Staff needs to amend additional statements in the complaint, and subsequently serve the amended complaint upon ABM Industries, Inc.

Nevertheless, because Department staff has yet to commence an administrative enforcement action against ABM Industries, Inc., Staff does not need to obtain my leave in order to exercise its prosecutorial discretion to: (1) withdraw the charges alleged in the May 23, 2007 complaint against Brewster Cleaners, Inc.; and (2) draft a new complaint [or amend the May 23, 2007 complaint] that identifies ABM Industries, Inc. as a Respondent and which asserts that ABM Industries, Inc. owns and operates a regulated dry cleaning facility that has not complied with applicable requirements of the Environmental Conservation Law and implementing regulations.

Ruling

Department staff may not obtain personal jurisdiction over a new Respondent by moving to amend the caption of a complaint that had been served upon the new Respondent, but which does not assert any claims against the new Respondent, and then move for a default judgment against that new Respondent. Accordingly, Staff's motion for a default judgment against ABM Industries, Inc. is denied. Staff has discretion to draft, and subsequently serve, a complaint that identifies ABM Industries, Inc. as a Respondent.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: March 14, 2008
Albany, New York

TO: William Mangieri, Jr.
c/o Brewster Cleaners, Inc.
99 State Route 22
Brewster, New York 10509-1526

ABM Industries, Inc.
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Appendix A Complaint dated May 23, 2007
Brewster Cleaners, Inc.
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