

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law of the New York State (ECL) and Title 6, Part 750 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

**C AND J ENTERPRISES, LLC and
JAMES P. BURR, Individually,**

Respondents.

**RULING ON
RESPONDENTS' MOTION
TO DISMISS**

DEC Case No.
R5-20160308-2200
(Deerfield Estates
Mobile Home Park)

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

-- Young/Sommer LLC (Kevin M. Young, of counsel), for respondents C and J Enterprises, LLC and James P. Burr

I. Proceedings

This matter involves allegations by staff of the New York State Department of Environmental Conservation (Department) that respondents C and J Enterprises, LLC and James P. Burr (respondents) have violated ECL article 17 and its implementing regulations, 6 NYCRR part 750, and Order on Consent No. R5-20080515-814 with respect to the operation of a wastewater treatment system located at property known as Deerfield Estates Mobile Home Park, located in the Town of Perth, Fulton County, New York (site).

By motion dated February 27, 2018, respondents moved to dismiss all of the claims for penalties for ECL violations occurring before May 16, 2013 based on a CPLR 214(2) statute of limitations argument. Respondents argue that the three-year statute of limitations of CPLR 214(2) is applicable to a cause of action seeking recovery of penalties imposed by statute. Respondents also argue that respondents are substantially prejudiced by Department staff's delay in bringing this proceeding. Respondents' motion only seeks dismissal on the statute of limitations grounds.

By papers dated March 27, 2018, Department staff opposed the motion arguing that CPLR statute of limitations are not applicable to administrative proceedings governed by 6 NYCRR part 622. Department staff further argues that respondents have not demonstrated any prejudice that would warrant dismissal of staff's claims.

On April 4, 2018, respondents sought leave to reply to Department staff's papers in opposition to respondents' motion to dismiss "to update [the undersigned] in relation to additional information that developed after the filing of this motion." Respondents attached their reply and supporting documents. By letter of the same date, I denied respondents' request to file a reply. Despite my ruling denying the request, respondents subsequently requested that I consider the arguments contained in respondents' reply. I decline to revisit the request.

Attached hereto as appendix A is a list of the documents considered on respondents' motion and other outstanding requests of the parties.

II. CPLR Statute of Limitations

"It is well settled that the CPLR statute of limitations provisions only apply to civil judicial proceedings. None of the CPLR article 2 provisions have been incorporated into 6 NYCRR Part 622. In short, the limitation periods established by the CPLR are not applicable to this administrative enforcement proceeding" (see Matter of Oldcastle, Inc., Ruling, February 29, 2016, at 13-14, citing Matter of Stasack, Ruling of the Chief ALJ, December 30, 2010 at 9; Matter of Edkins Scrap Metal Corp., Ruling of the ALJ, March 10, 2015, at 19 and 23). Respondents' arguments to the contrary are meritless. Accordingly, respondents' motion to dismiss based on the CPLR statute of limitations is denied.

III. Respondents' Claim of Prejudice

Respondents also claim they would be unduly prejudiced if Department staff is allowed to pursue claims for the alleged ECL violations occurring prior to May 16, 2013 due to staff's delay in commencing this proceeding. Respondents assert that if they had known Department staff would actually enforce the order on consent by seeking stipulated and statutory penalties, "notwithstanding Respondents' efforts to find a solution, that Respondents would have foregone their attempts to bring the WWTP in compliance" and would have closed the mobile home park in order to avoid the expense of upgrading the treatment system. Respondents do not expressly move for any claims to be dismissed based upon respondents' undue prejudice argument. Respondents motion requests dismissal "of all of the claims for penalties for ECL violations prior to May 16, 2013 due to the Statute of Limitations."

Nevertheless, respondents' motion does not demonstrate any significant and irreparable prejudice to respondents' defense of the proceeding resulting from any alleged delay (see Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 180-181 [1985], cert denied 476 US 1115 [1986]; see also Matter of Giambrone, Decision and Order of the Commissioner, March 17, 2010, at 11-13, confirmed in relevant part sub nom Matter of Giambrone v Grannis, 88 AD3d 1272, 1273 [4th Dept 2011]; Matter of Stasack, Ruling of the Chief ALJ on Motion for Clarification and To Strike Affirmative Defenses, Dec. 30, 2010, at 9). Respondents' motion

does not claim that delay has affected respondents' ability to defend against the alleged violations of the order on consent, law or regulations. Accordingly, to the extent respondents' motion seeks dismissal of Department staff's claims for penalties for ECL violations occurring before May 16, 2013 based on undue prejudice due to delay, the motion is denied.

IV. Respondents' Other Requests

Also before me are respondents' February 28, 2018 letter request to extend the deadline for filing motions beyond the February 28, 2018 deadline set by ALJ Bassinson and respondents' March 29, 2018 email opposition to Department staff's March 1, 2018 statement of readiness. Respondents' February 28, 2018 letter sets forth respondents' argument that the deadline for submission of motions should be extended until Supreme Court, Albany County, issues a decision on motions for summary judgment, which may, in respondents' words, "eliminate the need for an adjudicatory hearing and/or at a minimum, significantly reduce the scope" of the hearing in this matter. Respondents claim they agreed to submit a motion by the February 28, 2018 deadline because respondents believed that the issue would have been resolved by a decision in the Supreme Court matter by that date.

Department staff opposes respondents' request to extend the deadline for filing motions stating that respondents have had more than enough time to file motions in this matter. I agree. Respondents could have filed their motion before the deadline without a Supreme Court decision in hand, but failed to do so. At this time, any effect a court decision may have on this proceeding is purely speculative. If respondents wanted the summary judgment questions considered by the Office of Hearings and Mediation Services before hearing, respondents needed to file a timely motion for order without hearing. Respondents' request to extend the deadline for filing motions is denied.

Respondents' March 29, 2018 email (1) opposes staff's statement of readiness, (2) seeks adjournment of an adjudicatory hearing in this matter until a decision issues from Supreme Court, Albany County, on the parties' motions for summary judgment in that matter, and (3) repeats respondents' February 28, 2018 request to extend the deadline for filing motions so respondents may seek partial summary judgment regarding the question of respondent Burr's liability for penalties under the order on consent. For the reasons stated above, respondents' requests are denied.

V. Conclusion

1. Respondents' motion to dismiss all of the claims for penalties for ECL violations occurring before May 16, 2013 is denied in its entirety.
2. Respondents' request to extend the deadline for filing motions is denied.
3. Respondents' request to adjourn the adjudicatory hearing until a decision issues for Supreme Court, Albany County on the parties' motions for summary judgment in that matter is denied.

A conference call will be convened to schedule the hearing in this matter.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: April 10, 2018
Albany, New York

Appendix A

Matter of C and J Enterprises, LLC and James P. Burr, Individually

DEC Case No. R5-20160308-2200
(Deerfield Estates Mobile Home Park)

1. Cover letter from Kevin M. Young, Esq., dated February 27, 2018, attaching the following:
 - Affirmation of Kevin Young in Support of Motion to Dismiss ECL Claims Prior to May 2013, dated February 27, 2018, attaching exhibits A-D:
 - A. State of New York v C and J Enterprises, LLC, James P. Burr and Charles A. Glessing, (Supreme Court, Albany County, Index No. 2688-10), Summons, dated April 23, 2010 with Verified Complaint, dated April 22, 2010
 - B. State of New York v C and J Enterprises, LLC, James P. Burr and Charles A. Glessing, (Supreme Court, Albany County, Index No. 2688-10), Verified Answer, dated July 15, 2010
 - C. Notice of Hearing and Complaint, dated May 3, 2016, attaching Exhibits 1-6
 - D. Correspondence from Morgan A. Costello, Assistant Attorney General, to Kevin Young, dated August 27, 2015 re: settlement communication
 - Affidavit of Service Via Overnight Mail of Elizabeth B. Wykes, sworn to February 27, 2018
2. Cover Letter from Scott Abrahamson, dated March 30, 2018, attaching the following:
 - Affirmation of Scott Abrahamson, Staff's Response Opposing Respondents' Motion to Dismiss Certain ECL Claims, dated March 27, 2018, attaching exhibits 1-3
 1. Articles of Organization of C and J Enterprises, LLC, filed May 23, 1995 and Operating Agreement of C and J Enterprises, LLC, dated December 23, 2000
 2. Correspondence from Kevin Young to Hon. Michael S. Caruso, dated February 28, 2018, and Email from Kevin Young to Peter Casper, dated March 5, 2018
 3. Email from Kevin Young to Peter Casper, dated March 5, 2018, and Email from Kevin Young to John Urda, dated March 5, 2018, both with Correspondence from Kevin Young to Hon. Michael S. Caruso, dated February 28, 2018 attached, Correspondence from Morgan A. Costello to Kevin M. Young, Esq., with Affirmation of Morgan A. Costello, In Opposition To Amend Verified Answer, dated February 1, 2018 with 1 exhibit attached
 - Affidavit of Robert Streeter, Staff's Response Opposing Respondents' Motion to Dismiss Certain ECL Claims, sworn to March 27, 2018, attaching Exhibits 1-16

1. Wastewater Facility Inspection Report-Site Visit, dated October 30, 2008 with 6 photographs
 2. Correspondence from Robert W. Streeter to Kevin M. Young, dated November 21, 2008
 3. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated January 8, 2009 with Municipal/PCI Wastewater Facility Inspection Report dated January 6, 2009
 4. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated January 8, 2009 with Municipal/PCI Wastewater Facility Inspection Report dated January 8, 2009
 5. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated February 25, 2009
 6. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated "April , 2009" with certified mail receipt dated April 4, 2009
 7. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated March 27, 2009 with draft consent order
 8. Correspondence (Notice of Violation and Notice of Noncompliance) from Stephen L. Brewer to Kevin M. Young, dated June 2, 2009
 9. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated July 1, 2009
 10. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, C & J Enterprises, LLC, dated October 22, 2009
 11. Correspondence from Robert W. Streeter to James Burr, Owner, C & J Enterprises, LLC, dated February 16, 2010 with Municipal/PCI Wastewater Facility Inspection Report dated February 9, 2010
 12. Correspondence from Robert W. Streeter to James Burr, Owner, C & J Enterprises, LLC, dated November 16, 2010
 13. Correspondence (Notice of Violation) from Robert W. Streeter to James Burr, Owner, C & J Enterprises, LLC, dated January 6, 2012
 14. Correspondence (Notice of Suspension) from Marc S. Migliore to James Burr, C & J Enterprises, LLC, dated March 25, 2010
 15. New York State DEC Office of Public Protection Complaint received July 8, 2013
 16. Correspondence from Stephen L. Brewer to Kevin M. Young, dated October 14, 2008 with executed order of consent attached
- Memorandum of Law, Staff's Response Opposing Respondents' Motion to Dismiss Certain ECL Claims, dated March 27, 2018
3. Email from Kevin Young to Scott Abrahamson and Michael S. Caruso, dated March 29, 2018
 4. Cover letter from Kevin M. Young, dated April 4, 2018, requesting leave to file reply, attaching the following:
 - Reply Affirmation of Kevin M. Young, In Support of Motion to Dismiss ECL Claims Prior to May 2013, dated April 4, 2018, attaching Exhibits 1-3

1. Staff's Responses to Respondents' First Discovery Demands, dated November 30, 2017
 2. Copy of email from Scott Abrahamson to Kevin Young, dated February 28, 2018 and twenty-nine pages of various emails and correspondence responsive to supplemental discovery demands
 3. Sixty-four pages of various correspondence from November 16, 2010 to November 7, 2012.
5. Cover letter from Scott Abrahamson, dated March 1, 2018, attaching the following:
- Staff's Statement of Readiness, dated March 1, 2018, attaching exhibits 1-4
 1. Affidavit of Service of Amended Complaint on C and J Enterprises, LLC of Drew Wellette, sworn to May 17, 2017
 2. Affidavit of Service of Amended Complaint on James P. Burr of Scott Abrahamson, sworn to November 20, 2017
 3. Answer dated June 23, 2017 with Affirmation of Kevin Young, dated November 4, 2016 (Supreme Court Action) and Affidavit of James P. Burr, sworn to November 4, 2016 (Supreme Court Action)
 4. Staff's First Combined Discovery Demands, dated October 4, 2017
6. Correspondence from Scott Abrahamson, dated March 2, 2018
7. Correspondence from Scott Abrahamson, dated April 5, 2018