

In the Matter of the Alleged Violations  
of Articles 15, 17 and 24 of the New York  
State Environmental Conservation Law, and  
Parts 608 and 663 of Title 6 of the  
Official Compilation of Codes, Rules and  
Regulations of the State of New York,

by

ANTHONY COSTA a/k/a ANTHONY GAGLIARDI  
TERRYANN GAGLIARDI  
JEANNETTE GAGLIARDI  
KATHLEEN A. KRIEG  
ALFRED GALPINE  
CLOVER DRAINAGE, INC.  
THOMAS J. KEARNS, individually and as  
owner of Clover Drainage, Inc.  
L. PETROSINO, INC., and  
JOHN IPPOLITO TRUCKING & EXCAVATION,  
INC.,

RULING ON MOTION FOR  
ORDER WITHOUT  
HEARING AND LATE  
FILED REQUEST FOR  
EXTENSION

DEC# R2-20050622-187  
R2-20050622-188

April 6, 2007

Respondents.

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**SUMMARY**

This ruling denies the request of Terry Ann Gagliardi for an additional 60 days to answer. The request was untimely, and Ms. Gagliardi has indicated that even with the additional time, she lacks the financial resources to obtain counsel. This ruling also finds Ms. Gagliardi liable for the eight violations alleged by DEC staff in its renewed motion for order without hearing.

**PROCEDURAL HISTORY**

For a more extensive discussion of the earlier procedural history of this case, see my July 28, 2006 and December 13, 2006 rulings. The procedural history relevant to this ruling is summarized below.

DEC staff served its original motion for order without hearing in this case alleging a total of 71 violations against the nine named respondents. These violations relate to fill placed in a ravine behind two homes, 123 and 131 Keating Street in Staten Island, without the required DEC permits. The ravine contained a protected stream and NYSDEC regulated freshwater wetland.

In a ruling dated June 28, 2006, I found that DEC staff had proven 24 of these violations, including eight by Mr. Costa and Ms. Gagliardi, as owners of 123 Keating Street. Prior to this ruling, Mr. Costa and Ms. Gagliardi were not represented by counsel in this matter. They subsequently retained counsel and moved to vacate Mr. Costa's and Ms. Gagliardi's default.

By ruling dated December 13, 2006, I found that a question of fact existed regarding whether Ms. Gagliardi had been served with the original motion for order without hearing and directed that a hearing on this sole issue should be convened. I further found that Mr. Costa failed to show either that good cause for his default existed or that a meritorious defense was likely to exist. His request to vacate his default was denied. This ruling was appealed and is currently pending before the Commissioner.

In lieu of the fact hearing regarding the service on Ms. Gagliardi, DEC staff opted to serve Ms. Gagliardi with a copy of a new motion for order without hearing. This motion only included the causes of action for which I found Ms. Gagliardi liable in my June 28, 2006 ruling.

With a cover letter to me dated January 8, 2007, DEC staff counsel forwarded to me a copy of the papers that were served on Ms. Gagliardi.

By letter dated January 11, 2007, counsel for Ms. Gagliardi and Mr. Costa wrote to me stating that the new motion had been served on Ms. Gagliardi on January 9, 2007 and that DEC staff had agreed to an additional ten days to answer. By counsel's calculation, the answer was due on February 15, 2007.

By letter dated January 17, 2007, DEC staff counsel responded stating that Ms. Gagliardi had, in fact, been served on January 6, 2007. He enclosed the affidavit of personal service sworn to by Environmental Conservation Officer Jason S. DeAngelis.

By letter dated February 9, 2007, counsel who had been representing Mr. Costa and Ms. Gagliardi informed me that he was no longer representing them and requested sixty days for them to obtain new counsel.

By letter dated February 12, 2007, DEC staff counsel responded arguing that the 60 day extension should not be granted and stating that counsel had failed to show his clients' consent

to withdraw or properly move for withdrawal pursuant to CPLR 321. DEC staff counsel argued that Ms. Gagliardi's time for providing an answer expired on February 5, 2007 and requested a ruling on the merits of DEC staff's motion.

By letter dated February 14, 2007, Ms. Gagliardi's attorney stated that he did not need to make a formal withdrawal from this matter pursuant to CPLR 321 because the DEC regulations do not state that the CPLR applies and even if it did, since DEC Staff has recommenced this proceeding by serving a new complaint on Ms. Gagliardi, he had not formally appeared in the new proceeding.

On March 7, 2007, I received a letter from Ms. Gagliardi. This letter was dated February 10, 2007, but postmarked on March 5, 2007. In this letter she states that the reason for her attorney withdrawing from the case was because she could not continue to pay him and that she did not have resources to retain new counsel.

**MS. GAGLIARDI'S REQUEST FOR AN ADDITIONAL 60 DAYS TO ANSWER**

In his February 9, 2007 letter informing me that he no longer represented Mr. Costa and Ms. Gagliardi, counsel requested a 60 day stay in this proceeding to allow them to obtain new counsel. DEC staff counsel objected, arguing that respondents' counsel had not shown client consent to withdraw as required nor properly moved for withdrawal pursuant to CPLR 321. DEC staff counsel continued that even if the withdrawal were proper, counsel's letter was untimely because the time to answer expired on February 5, 2007. In a letter dated February 10, 2007 (but mailed March 5, 2007), Ms. Gagliardi wrote directly to me explaining that she does not possess the financial resources to retain a new attorney.

The request for an additional sixty days to obtain new counsel is denied. The request was made after the time to answer had expired, including the ten day extension which been agreed to by DEC Staff, and is untimely. Given Ms. Gagliardi's statement that she cannot afford to hire an attorney, even if 60 days were granted, she could not retain counsel and the extension would only result in additional delay.

Since Ms. Gagliardi's request for additional time is denied, a ruling on the merits of DEC staff's motion is required.

## FINDINGS OF FACT

1. Terry Ann Gagliardi is an owner of 123 Keating Street. This property is also identified as Richmond County Tax Block 6699, Lot 30.
2. The property located at 123 Keating Street contains a portion of regulated freshwater wetland AR-33 and its adjacent area. This property also contains portions of a stream that is a tributary of Lemon Creek. Lemon Creek has been classified as a navigable water of the State of New York and a Class B fresh surface water of the state pursuant to 6 NYCRR 890. Class B waters are suitable for fish propagation and survival as set forth in 6 NYCRR 701.
3. On June 6, 2005, ECO DeAngelis observed excavation, dumping and filling in the stream bed and freshwater wetland at the site. He also observed that a concrete pipe approximately 40 inches in diameter and 200 feet long had been placed in the stream bed and covered with a thin layer of fill. Employees of two companies were at the site: a dump truck crew from L. Petrosino, Inc. and an excavator crew from Clover Drainage, Inc.
4. On June 8, 2005 ECO DeAngelis returned to the site and observed an employee of John Ippolito Trucking and Excavating, Inc. grading and leveling fill in the stream bed and freshwater wetland. He also observed that the cleared and excavated areas had expanded since his visit two days earlier and additional fill had been brought to the site.
5. Ms. Gagliardi does not have the permits necessary for the activities described in findings of fact 3 and 4, above.

## DISCUSSION

In its new motion for order without hearing, DEC staff only alleges the eight violations against Ms. Gagliardi that I found her liable for in my June 28, 2006 ruling. Since the evidence presented with the new motion is identical to that produced with the first motion, my analysis is also the same.

DEC's uniform enforcement hearing procedures (6 NYCRR 622), which were last substantially amended in 1994, do not expressly address the standard for evaluating an uncontested motion for order without hearing. The regulations do address a contested motion in 622.12(d) which reads:

"(d) A contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. Likewise, where the motion includes several causes of actions, the motion may be granted in part if it is found that some but not all such causes of action or any defense thereto is sufficiently established. Upon determining that the motion should be granted, in whole or in part, the ALJ will prepare a report and submit it to the commissioner pursuant to section 622.18 of this Part."

In a 2004 case involving an uncontested motion for order without hearing, the Commissioner adopted "the written discussion in support set forth" in the ALJ's ruling/hearing report (Matter of Wilder, Order of the Commissioner, November 4, 2004, at 2). That ruling/hearing report stated:

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 3212. Section 622.12(d) provides that a motion for order without hearing "will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party." Section 622.12(d) also provides that the motion will be granted "in part if it is found that some but not all such causes of action or any defense should be granted, in whole or in part."

On a motion for summary judgment pursuant to the CPLR, "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law . . . . The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests . . . . '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988] [citations omitted] [quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980)]). Thus, 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 done so, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (id.). Facts appearing in the movant's papers that the opposing party fails to controvert may be deemed to be admitted (see Kuehne & Nagel, Inc. v Baiden, 36 NY2d 539, 544 [1975]).

In a 2006 decision, the Commissioner cited Wilder in the second footnote and stated:

"Where a respondent fails to answer a motion for an order without hearing, and Department staff does not file a motion for a default judgment, but seeks, instead, a determination on the merits of its motion for order without hearing, summary judgment principles are applied in analyzing the motion." (Matter of Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 7, fn 2).

This administrative precedent clarifies that summary judgment standards are used for both contested and uncontested motions for order without hearing. In this case, DEC Staff demonstrated its entitlement to summary judgment as a matter of law with respect to each element of the violations alleged.

### ***First Cause of Action***

In its first cause of action, DEC Staff alleges Ms. Gagliardi committed two violations of changing, modifying or disturbing a stream bed, in violation of ECL 15-0501 and 6 NYCRR 608.2. Specifically, DEC staff allege these violations occurred on June 6 and June 8, 2005.

DEC Staff alleges that the stream at the site is a tributary of Lemon Creek which is a navigable water of the State of New York and classified as a Class B fresh surface water pursuant to 6 NYCRR 890 (complaint paragraph 8). Attached to DEC Staff counsel's affirmation as Exhibit C is an aerial photograph from the Department's GIS 2004 aerial image data base that shows the stream crossing the site (both the Gagliardi and Galpine Families properties) and flowing into Lemon Creek.

In his affidavit, ECO DeAngelis states he observed

excavation, dumping and filling in the stream on June 6, 2005 on both the 123 and 131 Keating Street properties (paragraph 8). Attached as Exhibit B to this affidavit are six photographs taken by ECO DeAngelis at the site.

ECO DeAngelis continues in his affidavit that he again observed grading and leveling of fill in the stream bed on June 8, 2005 (paragraph 17). On this occasion, he observed that an employee of John Ippolito Trucking & Excavating, Inc. was operating a crawler/loader behind 123 and 131 Keating Street.

Based on this evidence, DEC staff has made a prima facie showing of entitlement to summary judgment as a matter of law with respect to these 2 violations.

### ***Second Cause of Action***

In its second cause of action, DEC staff alleges Ms. Gagliardi committed six violations of excavating, dumping and filling in regulated freshwater wetlands and adjacent areas in violation of ECL 24-0701 and 6 NYCRR 663.4. Specifically, three violations each occurred on June 6, 2005 and three on June 8, 2005.

In his affidavit, ECO Jason DeAngelis states that on June 6, 2005 he observed "excavation, dumping and filling in the freshwater wetland area" behind the homes at both 123 and 131 Keating Street. Attached to his affidavit are photographs he took of this activity at the site. ECO DeAngelis states he returned to the site on June 8, 2005 and observed work continuing at the site and additional excavation and placement of fill in the wetland area. He took additional photographs of the work at the site and these were included with his affidavit.

Based on this evidence, DEC staff has made a prima facie showing of entitlement to summary judgment as a matter of law with respect to these 6 violations.

### **CONCLUSION**

DEC staff has proven the eight violations alleged against Ms. Gagliardi.

April 6, 2007  
Albany, New York

\_\_\_\_\_/s/\_\_\_\_\_

P. Nicholas Garlick  
Administrative Law Judge

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