

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

In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law ("ECL") of the State of New York and Part 326 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

**RULING ON
MOTION FOR
DEFAULT JUDGMENT**

DEC Case No.
R2-20061018-438

- by -

**Diatect International Corp.
875 South Industrial Parkway
Heber City, Utah 84032,**

Respondent.

Proceedings

On April 2, 2007, staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Diatect International Corp. by mailing a copy of a notice of hearing and complaint, dated April 2, 2007, via certified mail to respondent at 875 South Industrial Parkway, Heber City, Utah.¹ Respondent received copies of this notice of hearing and complaint sometime prior to April 13, 2007 (see Exhibit "B" attached to staff's motion papers).

The complaint alleges that:

(1) on September 27, 2006, at 1202 Metropolitan Avenue, Brooklyn, New York, respondent distributed, sold and offered for sale unregistered pesticides in the State of New York in violation of Environmental Conservation Law ("ECL") sections 33-0701 and 33-1301.1(a);

¹ While the affirmation of Department staff attorney Alyce M. Gilbert, Esq. submitted in support of the instant motion indicates that this action was initially commenced by service of a notice of hearing and complaint upon respondent by certified mail on January 12, 2007, copies of those papers were not provided as part of staff's motion.

(2) on October 6, 2006, at 2748 Broadway Avenue, New York, New York, respondent distributed, sold and offered for sale unregistered pesticides in the State of New York in violation of ECL 33-0701 and 33-1301.1(a);

(3) on September 27, 2006, at 1202 Metropolitan Avenue, Brooklyn, New York, respondent distributed, sold and offered for sale unregistered pesticides in the State of New York in violation of section 326.14 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"); and

(4) on October 6, 2006, at 2748 Broadway Avenue, New York, New York, respondent distributed, sold and offered for sale unregistered pesticides in the State of New York in violation of 6 NYCRR 326.14.²

The April 2, 2007 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. The notice of hearing also stated that if respondent failed to file a timely written answer to the complaint it would be in default and would waive its right to a hearing. The notice of hearing did not schedule a pre-hearing conference as provided for by 6 NYCRR 622.8.

With a cover letter dated June 22, 2007, Alyce M. Gilbert, Esq., Senior Attorney with the Department's Division of Environmental Enforcement, filed a notice of motion for default judgment and motion for default judgment, both dated June 22, 2007, along with supporting papers against respondent with the Department's Office of Hearings and Mediation Services. The supporting papers consist of an affirmation by Ms. Gilbert dated June 22, 2007 ("Gilbert Affirmation"), that outlines respondent's alleged failure to file a timely answer, along with attached Exhibits marked "A" through "D."

Exhibit "A" contains copies of certified mail, return receipt request forms for a mailing from Ms. Gilbert to respondent on January 12, 2007.³ Exhibit "B" contains copies of

² See copy of complaint attached as Exhibit "C" to staff's motion papers.

³ As previously noted, Ms. Gilbert's affirmation indicates that a notice of hearing and complaint was mailed to respondent on January 12, 2007 (see Gilbert Affirmation, para. 5). Copies of that notice of hearing and complaint were not submitted with staff's motion papers.

certified mail, return receipt request forms for the mailing and receipt of the Department's April 2, 2007 notice of hearing and complaint to respondent on April 2, 2007. Exhibit "C" is a copy of the Department's April 2, 2007 notice of hearing and complaint filed against respondent. Lastly, Exhibit "D" contains a copy of Department staff's proposed order for its default motion as provided for in 6 NYCRR 622.15(b).

While Department staff's June 22, 2007 cover letter accompanying its default motion does not indicate that the motion papers were sent to respondent, both the June 22, 2007 notice of motion and motion indicate that copies of same were mailed to respondent, via certified mail, at 875 South Industrial Parkway, Heber City, Utah. Department staff's motion papers were also sent to the Department's Chief Administrative Law Judge ("Chief ALJ") in accordance with 6 NYCRR 622.6(c)(1). In a letter to Ms. Gilbert and respondent dated June 29, 2007, Chief ALJ James T. McClymonds assigned the matter to me.

The Gilbert Affirmation provides further details concerning the violations alleged in the April 2, 2007 complaint against respondent. In that regard, Ms. Gilbert notes that the violations alleged against respondent stem from inspections conducted by staff Pesticide Control Specialists I, Robert Jablonski and Robert Freese, of the Department's Region 2 office. According to Ms. Gilbert's affirmation, these Department inspections took place on September 27, 2006 at Right Way Dealer Warehouse, 1202 Metropolitan Avenue, Brooklyn, New York, and on October 6, 2006 at Broadway Hardware and Locksmith, 2748 Broadway Avenue, New York, New York. As a result of these inspections, Ms. Gilbert states that staff found certain violations consisting "of the sale and/or offer for sale of 1,653 containers of unregistered pesticides, in violation of ECL 33-0701, ECL 33-1301(1)(a), and 6 NYCRR 326.14(a)" (see Gilbert Affirmation, ¶¶ 2-4).

As previously noted, Ms. Gilbert indicates that she initially sent a notice of hearing and complaint for these violations, via certified mail, to respondent on January 12, 2007, and the signed, but undated, return receipt for same was received on January 26, 2007 (see Gilbert Affirmation, ¶¶ 5-6, and Exhibit "A" attached thereto). Thereafter, on April 2, 2007, staff served another notice of hearing and complaint, via certified mail, upon respondent and the signed, but again undated, return receipt for same was received on April 13, 2007 (see Gilbert Affirmation, ¶¶ 7-8, and Exhibit "B" attached thereto).

According to Ms. Gilbert, on May 7, 2007 -- the same day that respondent's answer was originally due -- Department staff was contacted by Randy Birch, Esq. who requested a one week extension of time to serve an answer on behalf of respondent (see Gilbert Affirmation, ¶ 11). That request was granted by staff and respondent's answer was then due on May 14, 2007 (see id.).⁴ According to Ms. Gilbert, respondent had not served an answer to the complaint by the time of Department staff's motion on June 22, 2007 (see id.).

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory papers -- such as a motion -- and service is made by mail, CPLR 2103(b)(2) gives the party so served five additional days within which to act (see also 6 NYCRR 622.6[b][2][i]). Thus, given the foregoing, respondent had until July 2, 2007 to file a response to Department staff's motion with me.

On July 5, 2007, I received respondent's written "Response to Complaint" dated June 28, 2007, from its attorney, Randy B. Birch, Esq. of Salt Lake City, Utah.⁵ The response denies all of the allegations in the Department's complaint and maintains that respondent "had submitted an application for approval prior to delivery of product in New York" and the application was approved (see respondent's Response to Complaint). On July 9, 2007, I received a letter from Ms. Gilbert indicating that Department staff had also received a copy of respondent's June 28, 2007 Response to Complaint from Mr. Birch on July 5, 2007.

The basis for staff's default judgment motion, as set forth in Ms. Gilbert's affirmation, is respondent's failure to file a timely answer to the April 2, 2007 complaint by May 14, 2007 (see Gilbert Affirmation, ¶¶ 10-12).

⁴ Pursuant to 6 NYCRR 622.4(a), Department staff may extend the time to answer.

⁵ The mailing envelope enclosing respondent's answer was postmarked June 28, 2007. Its delivery to the Department was likely delayed due to the intervening Independence Day (4th of July) holiday.

Findings of Fact

1. On April 2, 2007, Department staff attorney Alyce M. Gilbert, Esq. served a notice of hearing and complaint, both dated April 2, 2007, in DEC Case No. R2-20061018-438 upon respondent Diatect International Corporation by certified mail, return receipt requested, at 875 South Industrial Parkway, Heber City, Utah pursuant to 6 NYCRR 622.3(a)(3).⁶
2. The April 2, 2007 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. The notice of hearing stated that if respondent failed to file a timely answer, respondent would be in default and would waive its right to a hearing.
3. On May 7, 2007, attorney Randy Birch, Esq. contacted Department staff and requested a one week extension of time to answer the April 2, 2007 complaint on behalf of respondent (see Gilbert Affirmation, ¶ 11).
4. The time for respondent to serve an answer to the April 2, 2007 complaint, per staff's consent to attorney Birch's request for an extension, expired on May 14, 2007 (see id.). As of June 22, 2007, neither Mr. Birch nor anyone else on respondent's behalf had filed an answer to staff's complaint (see Gilbert Affirmation, ¶¶ 11-12).
5. On June 22, 2007, Department staff attorney Alyce M. Gilbert, Esq. served a notice of motion and motion for default judgment, both dated June 22, 2007, with supporting papers, upon respondent Diatect International Corporation by certified mail at 875 South Industrial Parkway, Heber City, Utah. Department staff's motion papers were not sent to respondent's attorney, Randy Birch, Esq.
6. On June 28, 2007, Randy Birch, Esq., served an answer to Department staff's complaint on respondent's behalf.

⁶ While, ordinarily, on a default motion Department staff proves service of the notice of hearing and complaint upon a respondent via an affidavit of service, the proof requirement was satisfied here when respondent submitted its answer to the complaint (see 6 NYCRR 622.15[b] and CPLR 3215[f]).

Discussion

In accordance with the Department's uniform enforcement regulations, Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of a notice of hearing and complaint "must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when the notice of hearing and complaint is received" (see 6 NYCRR 622.3[a][3]).

A respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]).⁷ Under those circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

- (1) proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- (2) proof of the respondent's failure to appear at a pre-hearing conference or failure to file a timely answer; and
- (3) a proposed order.

The June 22, 2007 affirmation of Department staff attorney Alyce M. Gilbert, Esq. demonstrates service of the April 2, 2007 notice of hearing and complaint upon respondent in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3) (see Exhibit "B" attached to Gilbert Affirmation). In addition, staff's papers demonstrate that neither respondent nor its attorney timely filed an answer to the April 2, 2007 complaint by May 14, 2007 as agreed to by the Department (see Gilbert Affirmation, ¶ 11).

The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the application by staff for a default judgment (see 6 NYCRR 622.15). However, under CPLR 3215(g)(1), notice of an application for a default

⁷ Staff's April 2, 2007 notice of hearing in this proceeding did not schedule a pre-hearing conference (see Exhibit "C" attached to Gilbert Affirmation).

judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004, at 2-3).

According to Department staff, respondent "appeared" in this action through its attorney, Randy Birch, Esq., on May 7, 2007 when he contacted staff and requested a one-week extension of time to answer on respondent's behalf (see Gilbert Affirmation, ¶ 11). Mr. Birch subsequently failed to submit an answer on behalf of respondent by May 14, 2007, the date established by Department staff (see Gilbert Affirmation, ¶¶ 10-12). According to the motion papers, staff thereafter mailed a copy of its June 22, 2007 default motion to respondent at its corporate address but did not mail a copy of the motion papers to respondent's attorney despite the May 7, 2007 conversation between Department staff and Mr. Birch (see Gilbert Affirmation, ¶ 11; see also Exhibits "B" and "C" attached to Gilbert Affirmation).⁸

Pursuant to 6 NYCRR 622.6(a)(1) and CPLR 2103(c), motion papers in Department proceedings may be served by mail. In accordance with the provisions of CPLR 3215(f) and (g), service by mail is complete upon proper posting, without regard to receipt (see Tappis v National Van Lines, Inc., 43 Misc2d 157 [App Term, 1964]; A. & B. Service Station, Inc. v State, 50 AD2d 973 [3d Dept], lv denied 39 NY2d 709 [1975]). Moreover, service of papers on an attorney is complete upon mailing (see CPLR 2103[b]; and Kihl v Pfeffer, 94 NY2d 118 [1999]). Nevertheless, as evidenced by staff's papers, here the Department's default motion was not served upon respondent's attorney as required by CPLR 2103(b).

The general rule prescribed by CPLR 2103(b) is that service of interlocutory papers in a pending action is to be made on the attorney for a party, and not upon the party (see Matter of Foreclosure of Tax Liens by City of Buffalo, 142 AD2d 1004 [4th Dept 1988]; see also 6 NYCRR 622.6[a][1]). In this case, staff was aware on May 7, 2007 that respondent was represented by Randy Birch, Esq. (see Gilbert Affirmation, ¶ 11). The request by Mr. Birch for an extension of time to answer constitutes an "appearance" on behalf of respondent, thereby triggering the requirements of CPLR 2103(b) and entitling Mr. Birch to service

⁸ Respondent's address is 875 South Industrial Parkway, Heber City, Utah 84032. Mr. Birch's address is Bostwick & Price, P.C., 139 E. South Temple #320, Salt Lake City, Utah 84111.

of staff's June 22, 2007 motion for a default judgment against respondent (see Matter of Makhan Singh, supra, at 2-3). Based upon staff's submissions, the Department did not provide notice of such motion to Mr. Birch in this case as required. Accordingly, staff's motion must be denied.

Conclusion

Department staff did not properly serve the notice of motion and motion for default upon respondent's attorney as provided for in CPLR 2103(b). Based on these circumstances, staff's motion for default judgment against respondent is hereby denied, without prejudice.

_____/s/_____
Mark D. Sanza
Administrative Law Judge

Dated: September 6, 2007
 Albany, New York

TO: Randy B. Birch, Esq. (By certified mail)
Bostwick & Price, P.C.
139 E. South Temple, #320
Salt Lake City, Utah 84111

Diatect International Corp. (By certified mail)
875 South Industrial Parkway
Heber City, Utah 84032

Alyce M. Gilbert, Esq. (By regular mail)
Senior Attorney
New York State Department of
Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500