STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

GLADIATOR REALTY CORP. and CANAL MANAGEMENT CORP.,

Respondents.

ORDER

DEC File No. R2-20060711-286

Respondent Gladiator Realty Corp. ("Gladiator" or "respondent"), by motion dated April 19, 2010, seeks to reopen the default judgment in this matter, which was issued by order dated January 14, 2010. Respondent was charged with violations of the Environmental Conservation Law and the Navigation Law, and their implementing regulations, with respect to a petroleum bulk storage facility that Gladiator owns at 381 Canal Street, Bronx, New York.

Respondent's papers included the affidavit sworn to on April 12, 2010, of Lazur Muller, an officer and principal of respondent, and to which exhibits A through J were attached. In addition, respondent submitted a memorandum of law in support of its motion. Staff of the New York State Department of Environmental Conservation ("Department") opposed the motion by affirmation dated April 23, 2010 (with attached exhibits A through F) of assistant regional attorney John K. Urda.

The Department's regulations provide that a motion to reopen a default judgment is to be made to the Administrative Law Judge ("ALJ") assigned to the matter (see 6 NYCRR 622.15[d]). When the motion is made to reopen a prior Commissioner order, the ALJ prepares a report on the motion and that report is submitted to me for my consideration and issuance

of a final order on the motion (see Matter of Nigro, Order of the Commissioner, July 13, 2009, at 1).

The motion to vacate the default judgment was made to ALJ Molly McBride under cover of a letter dated April 19, 2010. ALJ McBride prepared the attached report on the motion. As set forth in the ALJ's report, the legal standards that a party needs to satisfy on a motion to reopen a default judgment, and which are applicable here, appear at 6 NYCRR 622.15(d).

Section 622.15(d) provides that a motion to reopen a default judgment may be granted consistent with CPLR 5015. Section 622.15(d) further requires that the defaulting party demonstrate both good cause for the default and a likely existence of a meritorious defense (see also CPLR 5015[a][1]).

ALJ McBride recommends that I deny the motion to vacate the default judgment. She concludes that respondent has failed to demonstrate either "good cause" for the default or a likelihood of a "meritorious defense." Based on the record before me, I concur that respondent's submittals were insufficient to establish good cause for the default and insufficient to establish that a meritorious defense is likely to exist.

In addition, nothing in respondent's papers satisfies any of the legal standards set forth in CPLR 5015 that would lead to reopening the default. I agree with the ALJ that the cases under CPLR 5015 cited by respondent are distinguishable. In contrast to those cases, what occurred here was not an instance of a minor and one-time misstep by respondent, but rather a pattern of repeated failures to respond to the Department.

To the extent that respondent has raised any other issues in its motion, they have been considered and determined to be without merit.

Accordingly, respondent Gladiator Realty Corp.'s motion to vacate the default judgment is denied, and the attached order dated January 14, 2010 will continue in full force and effect.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By:_____
Alexander B. Grannis
Commissioner

Dated: July 1, 2010
Albany, New York

Attachments to this Order:

1. Order of the Commissioner dated January 14, 2010
2. ALJ's Report on Motion to Vacate Judgment dated June 29, 2010

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law of the State of New York, Article 12 of the New York State Navigation Law and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) by

REPORT ON MOTION TO VACATE JUDGMENT

GLADIATOR REALTY CORP. and CANAL MANAGEMENT CORP.,

DEC File No. R2-20060711-286

Respondents.

This ruling addresses respondent's motion to vacate a default judgment entered on January 14, 2010. By order dated January 14, 2010, Commissioner Alexander B. Grannis ordered that respondent Gladiator Realty Corp. (Gladiator, respondent) be adjudged in default with regards to the enforcement proceeding commenced by Department Staff.[1] Respondent was found to have violated the petroleum bulk storage regulations of the State of New York, section 17-0807 of the Environmental Conservation Law (ECL) and sections 173 and 176 of the Navigation Law (NL) and implementing regulations, 17 NYCRR 32.5 and 6 NYCRR 613.9(b). Respondent was assessed a civil penalty of eighty-two thousand five hundred dollars ($82,500.00) and was ordered to submit an approvable work plan for investigation and remediation of the petroleum contaminated site located at 381 Canal Street, Bronx, New York (site).

By motion dated April 19, 2010 respondent seeks to vacate the order pursuant to 6 NYCRR 622.15 and Civil Practice Law and Rules (CPLR) 5015. Respondent contends that there is both a reasonable excuse for the default and a meritorious defense to the action, the two required elements for the granting of the motion to vacate. (6 NYCRR 622.15). Respondent has submitted the sworn affidavit of Lazur Muller, officer and principal of respondent in support of the motion. Department staff has opposed the motion by affirmation of John K. Urda, assistant regional attorney, dated April 23, 2010.

DISCUSSION

Pursuant to 6 NYCRR 622.15(d) "the ALJ may grant a motion to reopen a default

[1] The default judgment was against respondent Gladiator Realty Corp. only. Service on respondent Canal Management Corp. was not established.

judgment upon a showing that a meritorious defense is likely to exist and that good cause for the default exists."

A) MERITORIOUS DEFENSE

There are two elements required to vacate a default, one is proof that "a meritorious defense is likely to exist." 6 NYCRR 622.15(d). Department staff had moved for a default judgment on three causes of action in its complaint. The order granting the default motion held that (1) respondent had an illegal discharge of petroleum on property it owns; (2) respondent failed to immediately undertake containment of the discharge; and (3) respondent failed to properly close a 2,000 gallon underground tank at the facility. Respondent's motion does not offer any meritorious defense to those causes of action. Respondent does not dispute the spills. As for the second cause of action, the only defense offered relates to respondent's investigation months and years after the spills, but not immediate containment. Finally, for the last cause of action, the respondent argues it removed the tanks. But, the removal of the tanks occurred several years *after* the spills and *after* the Department became involved. Respondent has offered nothing more than referencing work it has done to investigate and remediate *after* the violations occurred.

The Muller affidavit states that an April 2009 work plan prepared by the consultant was approved by the Department in September 2009 and he goes on to detail the work done to date that was outlined in the work plan. (Muller, p.5) The affirmation of John K. Urda, counsel for Department staff, states that the work plan referenced in the Muller affidavit, and attached as an exhibit to the affidavit, was never submitted to the Department. Further, the plan does not meet the Department's requirements for an investigation work plan and would not have been approved in that form. (Urda, p.5) Mr. Urda acknowledges that he, Department Engineer Brian Falvey and respondent's consultant discussed the general outlines of the proposed work plan in or about April 2009, but a plan was not submitted to the Department. (Urda, p.6) Mr. Urda provides details in his affirmation as to why the plan attached to the Muller affidavit would not be approved in that form. (Urda, p.6) Mr. Urda's affirmation states that respondent has not been cooperating over the years and has in fact ignored many of the Department's attempts to communicate with it. Respondent acknowledges that it received a letter in March 2009 from the Department's Office of Hearings and Mediation Services indicating that this Administrative Law Judge was assigned to the matter. However, respondent assumed they would be contacted again before any action was taken so they never contacted this office. (Muller, p.6)

Respondent submitted a memorandum of law in support of the motion to vacate that cites New York Supreme Court cases, not administrative cases. Section 622.15(d) of 6 of NYCRR references CPLR 5015 and the memorandum of law addresses cases that cite CPLR 5015. The line of cases supports the general principle that cases should be decided on the merits. Several of the cases cited were motions to vacate that were granted where the default occurred as a result of law office failure. There is no law office failure here. The respondent claims that it failed to appear as a result of its belief that the consultant was handling matters and that it was unfamiliar with administrative law. Also, it defends its failure to oppose the default motion by stating it did

not receive the papers. Respondent did in fact communicate directly with Department staff and was told by John Urda that a default motion was forthcoming. Respondent was asked to respond to a request for a consent order within one week and it did not respond.

The cases cited by respondent, *Anolick v. Travelers Ins. Co, 63 A.D. 2d 665, Long Island Trading Corp., v. Tuhill, 243 A. D. 617; Steel Krafts Building Materials and Supplies, Inc. v. Komazenski, 252 A.D. 2d 731;* and *Mothon v. ITT Hartford Group, Inc. 301 A.D. 2d 999* all involve the failure to serve an answer to the complaint in a timely manner. In this case, respondent failed to answer the complaint, AND failed to appear at the pre-hearing conference, AND failed to oppose the motion for default. Respondent was given ample time to resolve this matter with the Department. The complaint was served in 2008, the spills occurred in 1999 and 2003, and the default was not taken until 2010. Respondent knew of the spills and the Department's involvement when those spills occurred. However, according to Department staff, respondent ignored the Department's attempts to resolve the matters and forced the matter to be litigated. Even once the enforcement action was started, respondent could have resolved the matter with a consent order and failed. While case law supports deciding a case on the merits, the Department's regulations and the CPLR do allow for default judgments. In this case, the Department even withdrew several causes of action when it sought the default, after having those issues resolved to its satisfaction. There was no rush to judgment, and no attempt to get a default judgment without looking at the merits of the case.

B) <u>GOOD CAUSE FOR DEFAULT</u>

Respondent has stated in the Muller affidavit that the default occurred as a result of its unfamiliarity with administrative law, its confusion about the status of the matter, and because it did not receive a copy of the default motion papers. Mr. Muller provided great detail in his affidavit about the history of the enforcement matter. The first spill occurred in 1999 and, shortly after it occurred, respondent retained an environmental consultant (AES) and began to investigate the contamination. (Muller, p.2) A second spill occurred in 2003 and respondent continued to use its environmental consultant to assist with that spill while working with the Department. From 2003-2008 respondent had no direct contact with the Department. Instead, it "believed that the work that AES was doing was satisfactorily addressing the DEC's concerns" (Muller, p.3). Respondent acknowledges service of the notice of hearing and complaint that was served in 2008. Respondent did not provide the papers to legal counsel but instead sent them to the consultant and authorized it "to undertake the steps necessary to address the DEC's concerns." (Muller, p.4) Respondent states that it did not appear at the pre-hearing conference because it received a fax communication from the consultant shortly before the conference stating that four causes of action had been resolved but a work plan would need to be submitted for the remaining three causes of action. (Muller, p.4)

Respondent defends its failure to file an answer to the complaint by stating that the consultant was working with Department staff and that an application for the petroleum bulk storage tanks was filed after service of the complaint. Mr. Urda's affirmation notes that the application was filed after the time to answer the complaint had expired and respondent made no

request to extend that time. Mr. Urda also states the notice of hearing and complaint noticed a pre-hearing conference for May 14, 2008 stated in clear language that failure to appear at the conference "will result in a default under 6 NYCRR 622.15 and a waiver of the Respondent's rights to a hearing." (Urda, p.4) Finally, Mr. Urda and Mr. Muller had a telephone conversation in January 2009 wherein Mr. Urda advised Mr. Muller that he was preparing a default motion but would be amenable to settling the matter and asked respondent to respond in one week's time. (Urda, p.5) Mr. Urda says that he never received a response so he served the default motion. (Urda, p.5)

Respondent denies receiving the motion for default. No further explanation is given as to why it did not receive papers mailed to its business address. The order granting the default judgment notes that Department staff established service of the motion for default on respondent. Respondent's statement that it was not served with that motion is not credible.

C) PARTIAL VACATION OF ORDER ON ISSUE OF PENALTIES

Respondent's final argument is that even in cases where no meritorious defense or reasonable excuse is shown, courts have vacated defaults. Respondent cites *Gass v. Gass, 42 A.D. 3d 393,* where a default was vacated without the court finding a meritorious defense or excuse for default. In *Gass*, a matrimonial action, the defaulting wife formally appeared by serving a notice of appearance and request for judicial intervention (RJI) prior to the entry of the default. She had also served a motion to vacate the husband's note of issue prior to the default. The court was in error for not being aware of the appearance and default was vacated on that basis. The facts in *Gass* vary significantly from this case and the Court makes note of the fact that the rules for vacating a default in a matrimonial action are very liberal (*id at 366*). *Gass* is not applicable to this case.

RECOMMENDATION

I recommend that the Commissioner deny the motion to vacate the default judgment.

/s/

_____

Molly T. McBride
Administrative Law Judge

DATED: June 29, 2010
Albany, New York