

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 27 of the New York State Environmental Conservation Law, and Part 360 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York by:

Ruling on Department Staff's
February 27, 2019 Motion for
Order without Hearing

Gold Coast Pavers, Inc., and
Crescenzo Stasi, individually,
and as owner and operator of Gold Coast Pavers, Inc.
(Respondents)

DEC Case No.
R1-20171212-281

Proceedings

This ruling addresses a contested motion for order without hearing dated February 27, 2019 (February 2019 motion) brought by staff of the New York State Department of Environmental Conservation (Department staff). The motion alleges that respondents, Crescenzo Stasi and Gold Coast Pavers, Inc., violated the terms and conditions of an order on consent effective August 2, 2018 (August 2018 order [Exhibit 1]), as well as provisions of 6 NYCRR 360.9 for operating an unauthorized solid waste management facility located in the Town of Oyster Bay, Nassau County. The motion requests an order from the Commissioner that holds respondents liable for the violations alleged in the motion, directs payment of previously suspended civil penalties, assesses additional civil penalties, and requires site remediation.

Department staff's motion papers consist of a notice of motion for order without hearing; a motion for order without hearing; an attorney affirmation by Susan H. Schindler, Esq., Assistant Regional Attorney, dated February 27, 2019, in support of the motion; an affidavit from Nicholas Romero, sworn to February 26, 2019; and five exhibits.

Department staff's motion papers also include an affidavit of personal service by Drew A. Wellette, sworn to July 3, 2020. The affidavit demonstrates that on July 3, 2020, Department staff served a copy of the motion upon the corporate respondent, Gold Coast Pavers, Inc., pursuant to Business Corporation Law § 306, by personally providing an employee at the New York State Department of State, Division of Corporations, with a service of process cover sheet, and two copies of the motion papers (*see* 6 NYCRR 622.3[a][3] and 622.3[b][1]). Subsequently, the Office of Hearings and Mediation Services (OHMS) received an affirmation of mailing by Susan Schindler, Esq., dated August 19, 2020. The affirmation demonstrates that on August 19, 2020, Department staff served a copy of the motion papers upon Crescenzo Stasi, by certified mail, return receipt requested, consistent with the requirements outlined at 6 NYCRR 622.3(a)(3).

Upon service of a motion for order without hearing, 6 NYCRR 662.12(c) requires a response within 20 days. With a cover letter dated August 17, 2020, respondents' counsel, Vincent J. Trimarco, Jr., Esq. (Smithtown, New York), filed an affirmation dated August 5, 2020 opposing the motion for order without hearing.¹ Respondents also included an affidavit by Mr. Stasi, sworn to August 5, 2020.

A list of the parties' papers is attached to this summary report as Appendix A.

Findings of Fact

The following facts are determinable as a matter of law on Department staff's motion for order without hearing, which is the Department's equivalent of a summary judgment motion pursuant to CPLR 3212.

1. Crescenzo Stasi owns and operates Gold Coast Pavers, Inc., which is an active domestic corporation organized under the laws of New York State. The business is located at 501 Winding Road, Old Bethpage (Town of Oyster Bay, Nassau County), New York 11804. (*See* Schindler Affirmation ¶ 6; *see also* Romero Affidavit ¶ 4, and Exhibit 1 ¶¶ 8, 9, 10, 14, and 15.)
2. Old Beth II, LLC, owns the property located at 501 Winding Road (the site), which is about five acres, and leases the property to Gold Coast Pavers, Inc. (*See* Schindler Affirmation ¶ 6; *see also* Romero Affidavit ¶ 4, and Exhibit 1, ¶¶ 10, and 15.) The terms and conditions of the lease are not known.
3. On July 3, 2020, a member of Department staff personally provided an employee of the New York State Department of State, Division of Corporations, with a service of process cover sheet, and two copies of the motion papers consistent with Business Corporation Law § 306 (*see* Affidavit of Personal Service by Drew A. Wellette, sworn to July 3, 2020).
4. On August 19, 2020, Department staff served a copy of the motion papers upon Crescenzo Stasi by certified mail, return receipt requested (*see* Affirmation of Mailing by Susan Schindler, Esq., dated August 19, 2020).
5. On June 20, and November 16, 2017, Department staff visited the site, and observed that respondents were operating an unauthorized solid waste management facility (SWMF). To address the alleged violations observed during staff's site visits, Department staff and respondents entered into Order on Consent RI-20121212-281, which became effective on August 2, 2018 (August 2018 order [Exhibit 1]). (*See* Romero Affidavit ¶ 5, and Exhibit 1; *see also* Trimarco Affirmation ¶ 4.)

¹ In the August 17, 2020 cover letter, Mr. Trimarco states, in part, that he "represents the Respondents in the above entitled action."

6. The terms and conditions of the August 2018 order include Appendix A (Compliance Schedule) and Appendix B (Payment Schedule). Appendix A required respondents to undertake the following. First, respondents were required to immediately cease and desist from operating a SWMF, and stop accepting any solid waste at the site. Second, respondents were required to submit a cleanup plan to Department staff for review and approval within 10 days from the effective date of the August 2018 order. Third, upon approval of the cleanup plan, respondents were required to implement the plan by removing all processed and unprocessed solid waste from the site at a rate of at least 300 cubic yards (CY) per week, and provide copies of the disposal receipts to the Department. Fourth, respondents were required to have all solid waste removed from the site within 120 days from the effective date of the August 2018 order. That date was October 2, 2018. (*See* Romero Affidavit ¶ 5, and Exhibit 1 [Appendix A - Compliance Schedule].)
7. The August 2018 order assessed a total civil penalty of \$70,000. Of that amount, \$10,000 was associated with a previous order on consent (R1-20170803-205). As part of the August 2018 order, respondents also agreed to make payments to an environmental benefit project (EBP). (*See* Romero Affidavit ¶¶ 6, 7, 8, and Exhibit 1 [Appendix B - Payment Schedule].)
8. The Department sent a letter dated September 27, 2018 to respondents' counsel noting the following. First, respondents did not file a cleanup plan as required by Appendix A (Compliance Schedule) of the August 2018 order. Second, respondents did not pay the full amount of the civil penalties and EBP payments consistent with the schedule outlined in Appendix B (Penalty Schedule) of the August 2018 order. The September 27, 2018 letter demanded that respondents comply with the August 2018 order, and pay the civil penalties, the EBP payments, as well as the suspended penalties. (*See* Romero Affidavit ¶¶ 12 and 13, and Exhibit 2.) As of February 2019, respondents had yet to submit the required cleanup plan to Department staff for review, and had not paid the balance of the civil penalties and other payments (*see* Romero Affidavit ¶¶ 10 and 11; *see also* Trimarco Affirmation ¶ 4).
9. On behalf of Department staff, Nicholas Romero inspected the site on January 9, 2019, and prepared an inspection report with photographs (*see* Romero Affidavit ¶ 18, and Exhibit 4). The January 9, 2019 inspection report identified 14 separate areas at the site, and described the nature of the solid waste material in each area. The solid waste included, among other things, piles of unprocessed concrete, asphalt, rock, brick, and soil; various piles of construction and demolition (C&D) debris; a berm consisting of C&D debris; several piles of processed C&D debris; piles of unprocessed asphalt; and piles of masonry waste. As described in the January 9, 2019 inspection report, most of the solid waste material was brought to the site since the parties signed the August 2018 order. (*See* Romero Affidavit ¶¶ 18, 19, 20, and Exhibit 4.)
10. Neither Gold Coast Pavers, Inc. nor Mr. Stasi has any authorization from the Department of operate a SWMF at the site (*see* Romero Affidavit ¶¶ 23, and 24).

Discussion

Pursuant to 6 NYCRR 622.12(a), Department staff may serve a motion for order without hearing either in lieu of a complaint or subsequent to service of a notice of hearing and a complaint. The motion must include supporting affidavits reciting all the material facts and other available documentary evidence (*see* 6 NYCRR 622.12[a]). Furthermore, the motion must include the following: (1) a statement that a response to the motion must be filed with the Chief ALJ within 20 days after receiving it, and (2) a statement that the failure to respond constitutes a default (*see* 6 NYCRR 622.12[b]; *see also* 6 NYCRR 622.15[a]).

With a cover letter dated August 17, 2020, respondents' counsel filed an affirmation dated August 5, 2020 opposing the motion for order without hearing, and an affidavit by Mr. Stasi, sworn to August 5, 2020. As noted in staff's motion papers, a response was due 20 days after service upon respondents, which was by July 23, 2020. Accordingly, the August 17, 2020 response was over three weeks late. Nevertheless, based on the record before me, it will be considered here.

A contested motion for order without hearing will be granted if, upon all the papers and proof, the cause of action (or defense) is established such that summary judgment can be granted under the CPLR (*see* 6 NYCRR 622.12[d]). "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law" (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report). CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*see Matter of Locaparra*, Commissioner's Decision and Order, June 16, 2003, at 4). To prevail on its motion, the moving party must establish either its causes of action or defenses sufficiently to warrant directing judgment in its favor as a matter of law, and do so by proffering evidentiary proof in admissible form. It is the moving party's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged or the defenses raised. After the moving party has done this, the burden shifts to the opposing party to put forth its proof.

I. Department Staff's Proof

Drew Wellette's affidavit of personal service, sworn to July 3, 2020, demonstrates that Department staff duly served the corporate respondent, Gold Coast Pavers, Inc., with a copy of the motion for order without hearing. Business Corporation Law § 306(b)(1) provides for service of process on the New York State Secretary of State as an agent for a domestic business corporation, such as Gold Coast Pavers, Inc. (*see also* 6 NYCRR 622.3[a][3]). In addition, Ms. Schindler's affirmation of mailing, dated August 19, 2020, demonstrates that Department staff

served Mr. Stasi with a copy of the motion for order without hearing by certified mail, return receipt requested, in a manner consistent with 6 NYCRR 622.3(a)(3).

To support the February 2019 motion, Department staff offered an affidavit of Nicholas Romero, sworn to February 26, 2019. Mr. Romero is a professional Environmental Engineer from the Department of Environmental Conservation, Division of Materials Management (DMM). He holds a Bachelor of Science degree in Chemical Engineering, and works in the Department's Region 1 offices located in Stony Brook, New York. (*See* Romero Affidavit ¶ 1.)

Mr. Romero's duties and responsibilities include, among other things, maintaining the records in the Department's Region 1 office related to solid waste management facilities (SWMF), reviewing permit applications, as well as closure and remediation plans for SWMF; inspecting such facilities to determine compliance; overseeing the construction, operation, and closure of such facilities; and, participating in investigations of facilities. He has performed hundreds of inspections, and reviewed dozens of permit applications and associated engineering reports. In addition, Mr. Romero maintains the DMM files in the Region 1 office. (*See* Romero Affidavit ¶¶ 2 and 3.)

With his affidavit, Mr. Romero offers five exhibits. These exhibits include copies of the August 2, 2018 Order on Consent (*see* Exhibit 1) entered into between the Department and respondents to resolve alleged violations; correspondence that Department staff sent to respondents (*see* Exhibit 2); a notice of pre-hearing conference and complaint (*see* Exhibit 3); and an inspection report (*see* Exhibit 4). These exhibits are the Department's business records maintained by DMM. Exhibit 5 to Mr. Romero's affidavit is a civil penalty calculation.

II. Respondents' Proof

With a cover letter from Mr. Trimarco dated August 17, 2020, respondents filed an attorney affirmation opposing the motion dated August 5, 2020, and an affidavit by Mr. Stasi, sworn to August 5, 2020. In his affirmation, Mr. Trimarco acknowledges that respondents and Department staff entered into the August 2, 2018 order, and that respondents paid the first installment of the civil penalty, consistent with the terms of the August 2018 order. Mr. Trimarco acknowledges further that respondents did not obtain approval for the site cleanup plan. (*See* Trimarco Affirmation ¶ 4, and Exhibit 1.) Mr. Stasi states that he does not have access to the site, and that his financial circumstances have changed since August 2018. Nevertheless, he would like to submit a cleanup plan for staff's approval, and would implement it. Because he lost access to the site, Mr. Stasi denies staff's allegations that he disposed of additional solid waste materials at the site since August 2018. (*See* Stasi Affidavit ¶¶ 3, 5, 6, and 7.)

III. Service of the October 16, 2018 Notice of Pre-hearing Conference and Hearing, and Complaint

Respondents' papers assert a lack of notice with respect to notice of pre-hearing conference and hearing, and a complaint, each dated October 16, 2018. The notice scheduled a pre-hearing conference at 9:30 a.m. on November 8, 2018 at the Department's Region 1 offices. The complaint alleged that respondents failed to comply with the terms and conditions of the August 2018 order. Neither respondents nor their attorney appeared at the November 8, 2018 pre-hearing conference. Respondents did not answer the October 16, 2018 complaint as required by 6 NYCRR 622.4(a). (*See* Romero Affidavit ¶¶ 14, 15, 16, 17, and Exhibit 3.)

According to Mr. Trimarco, a lack of proper notice accounts for respondents' failure to appear at the November 8, 2018 pre-hearing conference. Mr. Trimarco requests the opportunity to answer the October 16, 2018 complaint or, in the alternative, to enter into a new order on consent with civil penalties that are substantially reduced from those prescribed in the August 2018 order. According to Mr. Trimarco, Department staff did not include copies of the affidavits of service referenced in the motion papers. Based on the foregoing reasons, respondents move to deny the motion for order without hearing. In his affidavit, Mr. Stasi states that he did not receive notice of the November 8, 2018 pre-hearing conference. He states further that he would have appeared at the pre-hearing conference had he received notice of it. (*See* Trimarco Affirmation ¶¶ 3, 6, 7, and 9; *see also* Stasi Affidavit ¶ 6.)

Department staff sent a notice of pre-hearing conference and hearing, and a complaint, each dated October 16, 2018, by certified mail, return receipt requested to Mr. Trimarco, as respondents' attorney.² However, mailing a summons and complaint to an attorney does not constitute valid service upon defendants, absent evidence that defendants had previously authorized their attorney to accept process on their behalf (*see Broman v Stern*, 172 AD2d 475, 476-477 [1991]).

With respect to the captioned matter, staff did not demonstrate that respondents had designated Mr. Trimarco as their agent to accept process on their behalf. Therefore, based on *Broman* (172 AD2d 475), Department staff did not obtain personal jurisdiction over respondents with respect to the October 16, 2018 notice of pre-hearing conference and hearing, and the complaint.

However, respondents' claim about lack of notice with respect to the October 16, 2018 complaint has been rendered moot. Although Department staff may have initially intended to move for an order without hearing in addition to serving the October 16, 2018 complaint, respondents are not prejudiced by staff's subsequent election to proceed by a motion for order without hearing in lieu of a complaint (*see* 6 NYCRR 622.12[a]). With respect to the February 27, 2019 motion, staff personally served the respondent corporation by delivering copies to the Secretary of the New York State Department of State. In addition, staff sent Mr. Stasi a copy of

² Exhibit 3 to Mr. Romero's affidavit includes an affidavit of mailing by Karen Mascio sworn to October 17, 2018, and a copy of the certified mail receipt.

the motion papers by certified mail, return receipt requested. (*See* Business Corporation Law § 306[b][1] and 6 NYCRR 622.3[a][3].)

IV. Department Staff's February 2019 Motion

By the February 2019 motion, Department staff seeks to enforce the compliance schedule appended to the August 2018 order (*see* Exhibit 1, Appendix A). As noted above in the Findings of Fact, the August 2018 order resolved alleged violations associated with Department staff's inspections of the site on June 20 and November 16, 2017. The compliance schedule appended to the August 2018 order required respondents to immediately stop accepting solid waste at the site, and to remove at least 300 CY of solid waste material from the site, on a weekly basis, until all of the waste was disposed at an authorized SWMF. In addition, respondents had agreed to file a cleanup plan within 10 days from the effective date of the August 2018 order. (*See* Romero Affidavit ¶ 5, and Exhibit 1-Appendix A.) Appendix B to the August 2018 order was a payment schedule outlining the amounts and dates by which payments had to be received by the Department (*see* Exhibit 1-Appendix B).

A. The August 2, 2018 Order on Consent

When respondents did not timely submit the cleanup plan, staff sent a letter dated September 27, 2018 to respondents' counsel noting the following. First, respondents did not file a cleanup plan as required by Appendix A (Compliance Schedule) of the August 2018 order. Second, respondents did not pay the full amount of the civil penalties and EBP payments consistent with the schedule outlined in Appendix B (Penalty Schedule) of the August 2018 order. The September 27, 2018 letter demanded that respondents comply with the August 2018 order, and pay the civil penalties, the EBP payments, and the suspended penalties. (*See* Romero Affidavit ¶¶ 12, 13, and Exhibit 2.) As of February 2019, respondents have yet to submit the required cleanup plan to Department staff for review and approval, and have not paid the balance of the civil penalties and other payments (*See* Romero Affidavit ¶¶ 10, 11). Therefore, respondents did not comply with the requirement in the August 2018 order to have all waste material removed from the site to an authorized SWMF by October 2, 2018. Accordingly, I recommend that the Commissioner grant this portion of Department staff's February 27, 2019 motion for order without hearing.

B. Additional Allegations

During the January 9, 2019 site visit, Department staff observed that additional solid waste had been discarded at the site since October 2, 2018, in contravention of the terms and conditions of the August 2018 order. (*See* Romero Affidavit ¶¶ 18-20, and Exhibit 4.) Consequently, staff alleged in the motion that respondents violated 6 NYCRR 360.9(a)(1), 360.9(b)(2)(iii), and 360.9(b)(4) (*See* Schindler Affidavit ¶¶ 17, and 18; *see also* Romero Affidavit ¶¶ 21-24).

Section 360.9(a)(1) prohibits any person from constructing or operating a SWMF except with a registration or a permit from the Department. The Department never issued any authorization to operate a SWMF at the site (*see* Romero Affidavit ¶¶ 23, and 24). Yet, Department staff observed solid waste at the site during the January 9, 2019 inspection subsequent to October 2, 2018 (*see* Romero Affidavit ¶¶ 18-20, and Exhibit 4).

Pursuant to 6 NYCRR 360.9(b)(2)(iii), no person can construct or operate a facility in violation of any term or condition of any final determination or order of the Commissioner made pursuant to the ECL, whether issued on consent or otherwise. The August 2018 order is an order of the Commissioner made pursuant to the ECL and issued on consent of the Department and respondents. The terms and conditions of the August 2018 order directed respondents to immediately cease from accepting all solid waste at the site (*see* Exhibit 1, Compliance Schedule [§ I *Cease Accepting Solid Waste*]). In addition, the August 2018 order directed respondents to remove at least 300 CY of solid waste material from the site, on a weekly basis, until respondents removed all of the solid waste from the site to an authorized SWMF (*see* Exhibit 1, Compliance Schedule [§ II *Site Cleanup*]). As a result, respondents were required to remove all solid waste from the site by October 2, 2018. However, when Department staff inspected the site on January 9, 2019, solid waste remained there, and additional solid waste had been brought to the site.

Section 360.9(b)(4) of 6 NYCRR prohibits any person from discarding waste except at duly authorized facilities pursuant to 6 NYCRR part 360, as well as parts 361, 362, 363, 365 or Subpart 374-2. However, the Department never issued any authorization to operate a SWMF at the site (*see* Romero Affidavit ¶¶ 23, and 24). Yet, during the January 9, 2019 inspections, Department staff observed additional solid waste discarded at the site subsequent to October 2, 2018 (*see* Romero Affidavit ¶¶ 18, 19, 20, and Exhibit 4).

According to Mr. Stasi, the property owner locked him out of the site after respondents and Department staff entered into the August 2018 order. Because he did not have access to the site subsequent to August 2018, Mr. Stasi states that another party is responsible for the solid waste materials that staff observed during the January 9, 2019 site visit. According to Mr. Stasi, issues of fact exist about who is responsible for disposing additional solid waste material at the site since October 2, 2018. (*See* Stasi Affidavit ¶¶ 3, 4, and 6.) Mr. Stasi requests the opportunity to use the discovery process to determine who is responsible for disposing the additional solid waste material at the site since he was locked out. Nevertheless, Mr. Stasi states that he would implement an approved cleanup plan. (*See* Stasi Affidavit ¶ 7.)

With the August 17, 2020 response, respondents did not include any documentary evidence to corroborate the statements in Mr. Stasi's affidavit concerning his access to the site since October 2, 2018. Nevertheless, Mr. Stasi's affidavit raises a fact issue about whether he had access to the site subsequent to October 2, 2018.³ Without access to the site, Mr. Stasi could not remove any solid waste material from the site, and he could not have discarded any additional solid waste material on the site.

³ *See* Trimarco Affirmation ¶ 3 *citing* *Valentin v Parisio*, 119 AD3d 854, 855 (2014).

Given these circumstances, a hearing will be necessary to determine whether the property owner prevented Mr. Stasi from accessing the site and, if so, when. Therefore, triable issues of fact are raised whether respondents violated:

1. 6 NYCRR 360.9(a)(1) by continuing to operate a SWMF at the site from October 2, 2018 until staff's site visit on January 9, 2019 without any registration or a permit from the Department;
2. 6 NYCRR 360.9(b)(2)(iii) when the respondents did not fulfill the compliance schedule appended to the August 2018 order prior to staff's January 9, 2019 site visit; and
3. 6 NYCRR 360.9(b)(4) when respondents discarded additional solid waste at the site from October 2, 2018 until staff's site visit on January 9, 2019 without any registration or a permit from the Department.

Accordingly, I deny this portion of Department staff's February 27, 2019 motion for order without hearing. A hearing is necessary to develop a factual record about respondents' access to the site after October 2, 2018.

V. Relief

In the February 27, 2019 motion, Department staff requests an order from the Commissioner that would require the following relief (*see* Schindler Affirmation at 5-6). First, staff seeks a determination that respondents failed to comply with the terms and conditions of Appendix A-Compliance Schedule attached to the August 2018 order, and violated 6 NYCRR 360.9(a)(1), 360.9(b)(2)(iii), and 360.9(b)(4). As a result of respondents' failure to comply with the August 2018 order, the Commissioner should direct them to comply with the requirements outlined in the Compliance Schedule which includes, among other things, removing all solid waste from the site within 30 days.

Second, staff seeks civil penalties. ECL 71-2703(1) authorizes the Commissioner to assess civil penalties for violations of chapters 3 or 7 of ECL article 27. Such violations include the failure to comply with any rule or regulation, as well as the failure to comply with the terms and conditions of a permit, or any final determination or order of the Commissioner. The Commissioner may assess up to \$7,500 per violation, and an additional \$1,500 for each day that a violation continues.

The August 2018 order assessed a total civil penalty of \$70,000. This total amount included a \$10,000 civil penalty associated with a previous order on consent (R1-20170803-205). Of the total civil penalties assessed in the August 2018 order, \$20,000 was payable, \$20,000 was payable as part of an environmental benefit project associated with the Long Island Groundwater Study sponsored by the USGS-New York Water Science Center, and \$30,000 was suspended, provided respondents complied with the order. Appendix B to the August 2018 order provided a Payment Schedule that authorized respondents to pay the civil penalties in installments. (*See* Exhibit 1, ¶ III at 4-5, and Appendix B-Payment Schedule). After making an

initial payment, respondents defaulted on the remaining installments, which were due by October 15, 2018 (*see* Romero Affidavit ¶¶ 9, 11 and Exhibit 1; *see also* Trimarco Affirmation ¶ 4).

Now, Department staff seeks an order from the Commissioner directing respondents to pay the balance of the outstanding payable portion of the civil penalty (\$30,000), as well as the suspended portion of the civil penalty (\$30,000). Therefore, the outstanding civil penalties total \$60,000. For failing to comply with the terms and conditions of the August 2018 order as well as for allegedly violating provisions of 6 NYCRR 360.9, as discussed above, staff seeks an additional civil penalty of \$60,000. The total amount of civil penalties that staff seeks with the February 27, 2019 motion is \$120,000.

Staff's justification for the additional civil penalty of \$60,000 is outlined in Exhibit 5 to Mr. Romero's affidavit. For respondents' alleged violations of 6 NYCRR 360.9(a)(1) and 360.9(b)(2)(iii), staff requests a civil penalty of \$30,000 because respondents continuously operated a SWMF at the site from October 2, 2018, which was 120 days after the effective date of the August 2018 order, until staff's January 9, 2019 site visit, without any authorization from the Department. For the same period, staff requested a civil penalty of \$30,000 for the continued disposal of solid waste at the site in violation of 6 NYCRR 360.9(b)(4). According to Department staff, the potential maximum civil penalty for these two additional violations would be \$90,000.

With respect to the remediation of the site, respondents request the opportunity to develop a cleanup plan for Department staff's review and approval. Respondents state that they would implement the plan after staff approves it. (*See* Trimarco Affirmation ¶ 8; *see also* Stasi Affidavit ¶¶ 5, and 7.)

Respondents object to the civil penalties identified in the February 27, 2019 motion, however. Mr. Stasi states that "economic hardships have made it impossible to continue with installments" (*see* Stasi Affidavit ¶ 5). Mr. Stasi explains further that if Department staff could waive the civil penalties, he could fully implement the cleanup plan (*see* Stasi Affidavit ¶¶ 5, and 7; *see also* Trimarco Affirmation ¶¶ 7, and 8).

Respondents did not provide any documentary evidence to corroborate their claim that it is impossible to continue with installments. Mr. Trimarco explains, however, that respondents' economic hardship is compounded by the COVID-19 pandemic (*see* Trimarco Affirmation ¶ 9).

According to Appendix B to the August 2018 order, all payments were due by October 15, 2018 (*see* Exhibit 1 at 14). October 15, 2018 predates the commencement of the global pandemic associated with COVID-19 by more than two years. If respondents were not able to make installment payments subsequent to the initial payment, they had an obligation to advise Department staff. As demonstrated by the September 27, 2018 correspondence (Exhibit 2), Department staff notified respondents about the missed payments, and reminded respondents of their responsibility to continue with the payments. Mr. Stasi's affidavit does not provide any details about when respondents' economic hardships began, or the nature of those hardships. Based on these circumstances, I conclude that respondents did not put forth their proof and, as a

result, failed to meet their burden with respect to the payment of civil penalties outlined in Appendix B to the August 2018 order.

As noted above, the August 2018 order suspended civil penalties in the amount of \$30,000 pending respondents' compliance with the terms and conditions of Appendix A of the August 2018 order (*see* Exhibit 1). Staff seeks payment of these civil penalties with the February 27, 2019 motion for order without hearing. At the time that respondents executed the August 2018 order, they were aware of the consequences of not complying with the terms and conditions of the August 2018 order. Based on these circumstances, I conclude that respondents did not put forth their proof concerning their inability to pay the suspended civil penalties and, as a result, failed to meet their burden.

Because a hearing is necessary to determine whether respondents lost access to the site and, if so, when, I reserve on staff's request for any additional civil penalties requested in the motion for order without hearing until after the parties develop the hearing record. At the hearing, respondents may develop a factual record about their financial circumstances in October 2018 and currently.

In addition to the factual issues identified above, the parties must present information about whether the property owner, who is Old Beth II, LLC, will provide respondents with access to the site for remediation and, if so, under what conditions.

Conclusions

1. Department staff duly served the February 27, 2019 motion for order without hearing upon respondents Gold Coast Pavers, Inc., and Crescenzo Stasi in a manner consistent with 6 NYCRR 622.3(a)(3).
2. Respondents did not comply with the terms and conditions outlined in the August 2018 order to have all solid waste material removed from the site to an authorized SWMF by October 2, 2018, and failed to pay the assessed civil penalties by October 15, 2018.

Rulings

I recommend that the Commissioner grant, in part, Department staff's February 27, 2019 motion for order without hearing with respect to respondents' failure to comply with the terms and conditions of the August 2018 order in a timely manner.

I deny that portion of the motion related to alleged violations of 6 NYCRR 360.9. A hearing is necessary to develop a factual record about respondents' access to the site from August 2018 to the present. At the hearing, the parties will have the opportunity to present facts related to whether respondents violated the following provisions of 6 NYCRR 360:

1. 6 NYCRR 360.9(a)(1) by continuing to operate a SWMF at the site from October 2, 2018 until staff's site visit on January 9, 2019 without any registration or a permit from the Department;
2. 6 NYCRR 360.9(b)(2)(iii) when the respondents did not fulfill the compliance schedule appended to the August 2018 order prior to staff's January 9, 2019 site visit; and
3. 6 NYCRR 360.9(b)(4) when respondents discarded additional solid waste at the site from October 2, 2018 until staff's site visit on January 9, 2019 without any registration or a permit from the Department.

At the hearing, respondents will have the opportunity to develop a factual record about their financial circumstances in October 2018 and currently, as well as their ability to develop and implement a cleanup plan as described in Appendix A to the August 2018 order.

The parties must present information about whether Old Beth II, LLC, will provide respondents with access to the site for remediation and, if so, under what conditions.

Further Proceedings

A hearing is necessary to resolve issues of material fact as set forth above. This office will contact the parties after the issuance of this ruling to discuss further proceedings to resolve this matter.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: October 1, 2020
Albany, New York

Attachment: Appendix A – List of Motion Papers

Appendix A
List of the Parties' Motion Papers
DEC Case No. R1-20171212-281

Department Staff		
	Notice of Motion for Order without Hearing DEC Case No. R1-20171212-281 Dated: February 27, 2019	
	Motion for Order without Hearing Dated: February 27, 2019	
	Affidavit of Mailing by Karen Mascio Sworn to February 27, 2019	
	Attorney Affirmation in Support of Motion for Order without Hearing by Susan H. Schindler, Esq. Assistant Regional Attorney Dated: February 27, 2019	
	Affidavit of Nicholas Romero in Support of Motion for Order without Hearing Sworn to February 26, 2019	
		Exhibit 1 – Order on Consent Effective: August 2, 2018
		Exhibit 2 – Demand for Compliance, Penalties, and Suspended Penalties Dated: September 27, 2018
		Exhibit 3 – Affidavit of Mailing by Karen Mascio Sworn to October 17, 2018, and Notice of Pre-Hearing Conference and Hearing, and a Complaint Dated: October 16, 2018

		Exhibit 4 – Inspection Report with Photographs Dated: January 9, 2019
		Exhibit 5 – Penalty Calculation
	Affidavit of Personal Service by Drew A. Wellette Sworn to July 3, 2020	
	Affirmation of Mailing by Susan Schindler, Esq, Dated: August 19, 2020	
Respondents		
	Attorney Affirmation in Opposition to Motion for Order without Hearing by Vincent Trimarco, Jr., Esq. Dated: August 5, 2020	
	Affidavit of Crescenzo L. Stasi in Opposition to Motion for Order without Hearing Sworn to August 5, 2020	