STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

ISLAND CONTAINER CORP.; 271 MERRITT AVENUE LLC; GOLD COAST PAVERS, INC.; STASI INDUSTRIES, INC.; GARY BERKOWITZ as owner and/or operator and/or principal of Island Container Corp. and 271 Merritt Avenue LLC; and CRESCENZO STASI as owner of Gold Coast Pavers, Inc. and Stasi Industries, Inc.,

Respondents.

RULING

DEC File No.
R1-20190318-76

PROCEEDINGS

This ruling addresses a motion for order without hearing (motion for order) that was filed by staff of the New York State Department of Environmental Conservation (DEC or Department) with the Office of Hearings and Mediation Services on December 18, 2019.

On July 8, 2020 Department staff advised this office that it had reached a settlement with Island Container Corp., 271 Merritt Avenue LLC, and Gary Berkowitz (collectively, the settling respondents). Staff advised that the settlement resolved all of the allegations set forth in the motion for order against the settling respondents. Staff further advised that it wished to withdraw the matter as against the settling respondents, and to continue the matter as against respondents Gold Coast Pavers, Inc. (Gold Coast); Stasi Industries, Inc. (Stasi Industries); and Crescenzo Stasi (Stasi) (collectively, the Stasi respondents). Upon my receipt of a copy of the fully executed Order on Consent between staff and the settling respondents, I dismissed the settling respondents from this matter. Accordingly, this ruling addresses staff's motion for order against the Stasi respondents only.

Pursuant to section 622.12(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), Department staff may serve a motion for order without hearing in lieu of or in addition to a complaint. Here, staff served a notice of hearing and complaint (complaint[1]), dated March 27, 2019, on the Stasi respondents and

[1] The complaint is attached to the Rubinton affirmation as exhibit 3.

subsequently filed its motion for order on the complaint. The Stasi respondents filed an answer (Stasi answer[2]) to the complaint, dated April 22, 2019.

I note that Department staff did not serve the motion for order in a manner that is consistent with the requirements for service of a notice of hearing and complaint, as is required by 6 NYCRR 622.12(a). Rather, with the consent of the Stasi respondents' counsel, Vincent Trimarco, Esq., staff sent the motion for order to Mr. Trimarco by email only. Because the hearing file contained no email receipt or response of any kind from the Stasi respondents, I requested that Mr. Trimarco confirm whether he had received the motion.

By letter dated May 28, 2020, Mr. Trimarco advised that his firm had no record of having received the motion for order and further advised that his office had been experiencing severe problems with its email server for several months due to an apparent hack of the system. Mr. Trimarco requested that he be allowed at least two weeks to respond to the motion on behalf of the Stasi respondents. No party offered comment or opposition to the Stasi respondents' request.

By letter (letter ruling) dated June 2, 2020, I granted the Stasi respondents' request to file a response and directed Department staff to resend the motion for order to the Stasi respondents. I also directed Mr. Trimarco confirm, by email, his receipt of the motion for order. Lastly, I directed all parties to copy me on any email or other correspondence sent in furtherance of the directives in the letter ruling.

In accordance with the letter ruling, the Stasi respondents filed a response to the motion for order on June 17, 2020. The Stasi respondents' filing consists of an affirmation of Vincent J. Trimarco, Esq. (Trimarco affirmation), affirmed June 15, 2020; and an affidavit of Crescenzo L. Stasi (Stasi affidavit), sworn to June 15, 2020.

By its complaint and the motion for order, Department staff alleges that the Stasi respondents violated provisions of ECL article 27 and 6 NYCRR part 360 at a site (site) located at 271 Merritt Avenue, Wyandanch or Wheatly Heights, Suffolk County. Specifically, staff alleges that the Stasi respondents violated (i) 6 NYCRR 360.9(a)(1) by operating a solid waste management facility (SWMF) at the site without a permit; and (ii) 6 NYCRR 360.9(b)(3) by disposing construction and demolition debris (C&D) at the site without a permit.

Department Staff's motion for order includes: a memorandum of law (staff memorandum), dated December 4, 2019; a notice of motion for order without hearing (notice of motion) dated December 5, 2019; an affirmation of David S. Rubinton, Esq. (Rubinton affirmation), Assistant Regional Attorney, DEC Region 1, affirmed December 5, 2019, with attached exhibits; an affidavit of Mathew Merrill (Merrill affidavit[3]), Engineering Technician 2, DEC Region 1, sworn to July 31, 2019, with attached exhibits; and an affidavit of James Wade

[2] The Stasi answer is attached to the Rubinton affirmation as exhibit 5.

[3] The Merrill affidavit is attached to the Rubinton affirmation as exhibit 1.

(Wade affidavit[4]), Professional Engineer, DEC Region 1, sworn to August 12, 2019, with an attached exhibit.

Causes of Action

Department staff asserts two causes of action:

1. that "[b]y receiving and/or placing C&D at the Site, thereby operating a SWMF, without a Department permit, [the Stasi respondents] are in violation of . . . 6 NYCRR 360.9(a)(1)" (complaint ¶ 27; *see also* Rubinton affirmation ¶ 10); and

2. that "[b]y disposing C&D at the Site without a Department permit, [the Stasi respondents] are in violation of 6 NYCRR 360.9(b)(3)" (complaint ¶ 31; *see also* Rubinton affirmation ¶ 12).

The notice of motion states that Department staff seeks an order (i) holding respondents liable for the violations as alleged above; (ii) directing respondents to "[i]mmediately remove all of the solid waste from [the site] to authorized facilities for disposal;" (iii) imposing a civil penalty against respondents "as authorized by law pursuant to ECL § 71-2703 and 6 NYCRR Part 360;" (iv) directing respondents to "cease and desist from any and all future violations of the ECL and rules and regulations promulgated pursuant thereto;" and (v) [o]rdering such other and further relief as may be deemed just, proper, and equitable" (notice of motion ¶¶ I-V; *see also* complaint at 4).

Respondents' Position

The Stasi respondents oppose the motion for order and argue that "innumerable contested facts exist as to the Stasi Respondent[s'] liability for the acts complained of" (Trimarco affirmation ¶ 4). The Stasi respondents concede that they were hired by one of the settling respondents to demolish two buildings at the site, but argue that they did not "engage[] in the unauthorized operation of a solid waste management facility or unauthorized disposal of waste" (*id.*). They further argue that there are unsettled "question[s] of fact concerning the operations of the [site] and the fault of [the settling respondents,] or possibly other third parties" (*id.*).

FINDINGS OF FACT

Based upon the papers filed by Department staff and respondents, I make the following findings of fact:

1. The site is located at 271 Merritt Avenue, Wyandanch or Wheatly Heights, Suffolk County (Suffolk County Tax Map # 0100-03900-0400-035000) (complaint ¶ 2; Stasi answer ¶ 2; *see also* settling respondents' answer,[5] dated Apr. 15, 2019, ¶ 2).

[4] The Wade affidavit is attached to the Rubinton affirmation as exhibit 2.

[5] The settling respondents' answer is attached to the Rubinton affirmation as exhibit 4.

2. 271 Merritt Avenue LLC is the owner of the site (complaint ¶ 2; Stasi answer ¶ 2; *see also* settling respondents' answer ¶ 2).

3. In March 2017, one or more of the settling respondents hired respondent Stasi Industries to demolish two buildings at the site (Wade affidavit, exhibit W1 at 3 [purchase order, approved Mar. 24, 2017, identifying "Stasi Industries" as the vendor engaged to "demo 2 buildings 270 (sic) Merritt Ave"]; Stasi affidavit ¶ 23 [stating that "we were hired for demolition of two buildings" at the site]; *see also* affirmation of James P. Rigano, Esq., counsel to the settling respondents, dated Dec. 24, 2019, ¶ 4 [stating that the settling respondents "retained one of the Stasi Respondents . . . for the demolition of buildings at the site"]).

4. The Stasi respondents acknowledge that debris found at the site "post demolition" includes C&D from the demolition of the two buildings (Stasi affidavit ¶ 4 [stating that one of the areas of debris located at the site should consist "largely [of] C&D associated with the demolition of a warehouse and garage"]).

5. On November 7 and 8, 2018, Department staff visited the site (2018 site visits) and observed a "visibly depressed area [C&D pit] where native soil had been excavated and replaced with approximately two thousand nine hundred (2,900) cubic yards . . . of C&D" (Merrill affidavit ¶ 7).

6. During the 2018 site visits, Department staff also observed a "circular excavation area . . . which contained contaminated fill material;" several piles containing a total of approximately 500 cubic yards of recycled concrete aggregate (RCA); and a separate pile containing approximately 1,200 cubic yards of bank run soil (Merrill affidavit ¶¶ 7, 8; *id.* exhibit A § 2.0).

7. FMP Group, Ltd. (FMP), an environmental consultant engaged by the settling respondents, conducted a subsurface investigation at the site as part of a Site Characterization Work Plan (SCWP) that was approved by the Department. The subsurface investigation, which was observed by Department staff and representatives of the Town of Babylon, included excavation of 10 test pits to assess the composition and extent of fill in the C&D pit (Merrill affidavit ¶¶ 10-13; *id.* exhibits A § 1, B).

8. Ten test pits dug by FMP as part of the subsurface investigation confirmed that native soil had been excavated from the C&D pit and replaced with fill material consisting of soil mixed with C&D, including brick, concrete, metal, textile, asphalt, wood, tile, and fiberglass insulation (Merrill affidavit ¶ 12; *id.* exhibit A, appendix A; *id.* exhibit B).

9. FMP's laboratory analysis of samples taken from the ten test pits determined that contaminants in the C&D pit were generally at low or non-detect levels, but FMP recommended that material from one test pit be excavated and removed because the analysis detected lead at levels in exceedance of the 6 NYCRR part 375 soil cleanup objectives (SCO) for protection of groundwater (Merrill affidavit, exhibit A § 3.4).

10. In accordance with the SCWP, FMP also investigated the bank run soil pile and the RCA piles at the site. FMP determined that there were no exceedances of SCO for unrestricted use in relation to the bank run pile and only one exceedance in relation to the RCA piles (Merrill affidavit, exhibit A § 3.4 [describing the bank run soil as a "sand stockpile," and the SCA piles as having an exceedance in relation to a pesticide that was detected at "just above" the SCO for unrestricted use]).

11. Department staff sent a Notice of Violation (NOV), dated February 21, 2019, to respondents. The NOV references the buried C&D at the site and alleges that respondents violated ECL article 27 and 6 NYCRR part 360 by (i) the unauthorized operation of a solid waste management facility (citing 6 NYCRR 360.9[a][1]); and (ii) the unauthorized disposal of waste (citing 6 NYCRR 360.9[b][3]) (Merrill affidavit ¶¶ 15, 16; *id.* exhibit C).

DISCUSSION

Summary Judgment Standard

Pursuant to 6 NYCRR 622.12(d), 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.

A motion for summary judgment must be decided on the evidence presented by the parties, not on argument. Such evidence may include relevant documents and affidavits of individuals with personal knowledge of the disputed facts. Summary judgment is to be granted only where it is clear that there are no material issues of fact to be adjudicated (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [holding that summary judgment is "to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted)]).

As discussed below, applying the summary judgment standard to Department staff's motion, I conclude that staff's motion for order without hearing should be granted in part, and denied in part.

First Cause of Action

Department staff alleges that "[b]y receiving and/or placing C&D at the Site, thereby operating a SWMF, without a Department permit, [the Stasi respondents] are in violation of . . . 6 NYCRR 360.9(a)(1)" (complaint ¶ 27; *see also* Rubinton affirmation ¶ 10).

Pursuant to 6 NYCRR 360.9(a)(1), with certain exceptions not applicable here, a "person or persons must not . . . construct or operate a facility, or any phase of it, except in accordance with a registration or a permit issued by the department." The definition of "person" under the regulations is broad and there is no dispute that each respondent falls within its reach (*see* 6 NYCRR 360.9[b][198]). There is also no dispute that the Stasi respondents did not have authorization from the Department to construct or operate a facility. Accordingly, the contested

issues here are whether staff has established that activities at the site constitute the construction or operation of a facility and, if so, which of the respondents, if any, are liable for those activities.

Turning first to whether the site is a facility as contemplated by the regulations, I conclude that Department staff has met its burden to establish that the site is a facility. As relevant to the allegations here, a facility "means a location . . . employed in the management of solid waste beyond the initial collection process" (6 NYCRR 360.2[b][101]). Solid waste is broadly defined by the regulations to include a wide range of "discarded materials" and "C&D debris" is defined to include "waste resulting from . . . demolition of structures, buildings and roads" (6 NYCRR 360.2[a][1], [b][61]). The C&D pit contains C&D that was buried and disposed of at the site (findings of fact ¶¶ 3-5, 7-8). The burial and disposal of C&D constitutes "management of solid waste beyond the initial collection process." Accordingly, staff has established that 6 NYCRR 360.9(a)(1) was violated.

To hold a particular respondent liable for violating 6 NYCRR 360.9(a)(1), Department staff must establish that the given respondent constructed or operated the facility. Construction is broadly defined under 6 NYCRR 360.2(b)(60) to mean "any physical modification to the area or location of a facility, including, but not limited to, site preparation (e.g., clearing, grading, and excavation, etc.)." Department staff described the C&D pit at the site as a "visibly depressed area where native soil had been excavated and replaced with approximately two thousand nine hundred (2,900) cubic yards . . . of C&D" (findings of fact ¶ 5). The C&D pit is approximately 260 feet long by 30 feet wide by 10 feet deep[6] (Merrill affidavit, exhibit A § 2.0; *id.* figure 4.1 [area identified as the "Linear Depression"]; *id.* appendix A [test pit logs]).

Respondent Stasi Industries demolished two buildings at the site (findings of fact ¶ 3). As respondent Stasi acknowledges, Department staff "estimates that approximately 2,900 cubic yards ("CY") of buried construction and demo[li]tion debris" are located at the site (Stasi affidavit ¶ 3). Respondent Stasi also acknowledges that C&D from the demolition of the two buildings was left at the site (findings of fact ¶ 4). Nowhere in their response to the motion for order do the Stasi respondents contest the amount or origin of the 2,900 cubic yards of C&D that is buried in the C&D pit at the site (*see generally* Stasi affidavit; Trimarco affirmation).

Rather, referring to the exceedances of SCOs that FMP identified at the site, the Stasi respondents assert that the "type of contaminants seem to be very consistent with the historical use of the Subject site" (Stasi affidavit ¶ 5). This issue fails to raise a triable issue of fact because it does not relate to the material allegations of the complaint. The causes of action set forth in the complaint concern the "receipt," "placement," and "disposal" of "C&D in the ground" (complaint ¶¶ 22-31). The central allegation in the complaint, that 2,900 cubic yards of C&D were buried at the site, is not undermined or controverted in any way by the existence of (or lack of) contaminants at the site.

[6] These dimensions correspond to staff's estimate of approximately 2,900 cubic yards of C&D (i.e., 260' x 30' x 10' = 78,000 cubic feet, or about 2,889 cubic yards).

Similarly, the Stasi respondents' assertion that the site owners failed to properly secure the site and, thereby, may have "let the Subject site become a dumping haven," are of no moment (Stasi affidavit ¶ 12). Again, the central allegation in the complaint, that 2,900 cubic yards of C&D from the demolition of buildings at the site were buried in the C&D pit, is not undermined or controverted by the possibility that unknown parties may have engaged in illegal dumping at the site.

I conclude that Department staff has established as a matter of law that respondent Stasi Industries violated 6 NYCRR 360.9(a)(1) by placing and burying 2,900 cubic yards of C&D at the site.

I also conclude, however, that Department staff has failed to establish that either respondent Stasi or respondent Gold Coast is liable for violating 6 NYCRR 360.9(a)(1). The motion for order and supporting papers filed by Department staff do not establish that respondent Stasi personally participated in the demolition of the buildings or the management of C&D at the site.[7] Similarly, staff's papers do not establish that respondent Gold Coast participated in these activities. Rather, the record establishes that respondent Stasi Industries was contracted to demolish two buildings at the site and, thereby, created the C&D at issue in this proceeding (findings of fact ¶¶ 3-5).

Accordingly, a hearing is necessary to determine whether respondent Stasi or respondent Gold Coast is liable for violating 6 NYCRR 360.9(a)(1).

Second Cause of Action

Department staff alleges that "[b]y disposing C&D at the Site without a Department permit, [the Stasi respondents] are in violation of 6 NYCRR 360.9(b)(3)" (complaint ¶ 31; *see also* Rubinton affirmation ¶ 12).

Pursuant to 6 NYCRR 360.9(b)(3), with certain exceptions not applicable here, a person "must not . . . dispose of waste, beyond initial collection." As with the first cause of action, there is no dispute that each of the Stasi respondents is a person, and there also is no dispute that none of the respondents had authorization from the Department to dispose of waste at the site. Accordingly, the contested issues here are whether the activities alleged by staff at the site constitute the disposal of waste beyond initial collection and, if so, which of the respondents, if any, are liable for the disposal.

As discussed under the first cause of action, the site falls within the definition of a "facility" set forth under 6 NYCRR 360.2(b)(101). To be a disposal facility, the site must be a "facility where waste is intentionally placed and where the waste is intended to remain" (6

[7] I note that Department staff alleges that respondent Stasi is the "owner and/or operator" of respondent Stasi Industries (complaint ¶ 9; Rubinton affirmation ¶ 7). Staff does not, however, assert that respondent Stasi should be held liable as a responsible corporate officer (*see generally Matter of Call-A-Head*, Decision and Order of the Commissioner, Mar. 4, 2019, at 5 [stating that a corporate officer may be held individually liable under the responsible corporate officer doctrine where it is shown that the officer "ha[d] responsibility over the activities of the business that caused the violations"]).

NYCRR 360.2[b][85]). It is beyond cavil that the creation of the C&D pit (which measures approximately 260' long x 30' wide x 10' deep), and the burial of 2,900 cubic yards of C&D therein, demonstrates that the C&D was "intentionally placed" and that it was "intended to remain." I also note that, in accordance with 6 NYCRR 360.2(b)(262), the retention of any waste on-site for more than 12 months is generally deemed to constitute disposal.

In their response to the motion for order, the Stasi respondents do not argue that the C&D from the demolition was not disposed of at the site. Rather, as more fully discussed under the first cause of action, the Stasi respondents argue that certain contaminants identified at the facility are consistent with the past uses of the site and that poor site security may have led to illegal dumping activity (*see supra* at 6-7). These arguments do not defeat the motion for order because they do not undermine or controvert the determination that 2,900 cubic yards of C&D were buried, and thereby disposed of, at the site.

I conclude that staff has established that 6 NYCRR 360.9(b)(3) was violated by the burial of 2,900 cubic yards of C&D at the site.

To hold a particular respondent liable for violating 6 NYCRR 360.9(b)(3), Department staff must establish that the given respondent was responsible for the disposal of C&D at the site. As discussed under the first cause of action, respondent Stasi Industries demolished two buildings at the site and the Stasi respondents do not contest the amount or the origin of the 2,900 cubic yards of C&D that are buried at the site (*see supra* at 6).

I conclude that Department staff has established as a matter of law that respondent Stasi Industries violated 6 NYCRR 360.9(b)(3) by disposing of 2,900 cubic yards of C&D at the site.

For the same reasons discussed under the first cause of action, however, I conclude that Department staff has not established that either respondent Stasi or respondent Gold Coast is liable for violating 6 NYCRR 360.9(b)(3). Restated briefly, the motion for order and supporting papers filed by Department staff do not establish that respondent Stasi or respondent Gold Coast participated in the demolition of the buildings or the subsequent management of the C&D at the site.

Accordingly, a hearing is necessary to determine whether respondent Stasi or respondent Gold Coast is liable for violating 6 NYCRR 360.9(b)(3).

Relief

Department staff requests that the Commissioner issue an order (i) holding the Stasi respondents liable for the violations alleged in the motion for order, (ii) enjoining the Stasi respondents "from any further actions causing said violations to continue;" (iii) assessing a penalty against the Stasi respondents in an amount that is "deemed just, proper, and equitable;" and (iv) imposing "such other relief as the Commissioner shall deem just, necessary and appropriate" (Rubinton affirmation at 4).

Department staff cites the penalty provisions set forth under ECL 71-2703 in support of the imposition of a penalty (staff memorandum at 2). Pursuant to ECL 71-2703,

> "[a]ny person who violates any of the provisions of, or who fails to perform any duty imposed by title 3 or 7 of article 27 of this chapter or any rule or regulation promulgated pursuant thereto . . . shall be liable for a civil penalty not to exceed seven thousand five hundred dollars for each such violation and an additional penalty of not more than one thousand five hundred dollars for each day during which such violation continues."

As discussed herein, Department staff has proven that respondent Stasi Industries is liable under both causes of action alleged in the complaint. Moreover, both of the proven violations continued for well over two years[8] and, pursuant to ECL 71-2703, respondent Stasi Industries is liable for a penalty of up to $1,500 per day for each violation. Therefore, the maximum authorized statutory penalty for each of the proven violations exceeds one million dollars (*see* Commissioner Policy DEE-1, Civil Penalty Policy, issued June 20, 1990 [DEE-1], § IV.B [stating that "[t]he starting point of any penalty calculation should be a computation of the potential statutory maximum for all provable violations"]).

Because Department staff does not request a specific penalty amount, or any other specific form of relief, a hearing is necessary to determine what relief should be recommended to the Commissioner. At hearing, staff must be prepared to present a specific penalty request and explain the method used to determine the amount of the request. This must include appropriate references to DEE-1 and any applicable program-specific penalty policies. Department staff must also specify any corrective action or other relief it seeks and set forth the basis for such request.

CONCLUSIONS OF LAW

As detailed above, I conclude that Department staff's motion must be granted in part, and denied in part. Specifically, I conclude that Department staff's motion for order should be granted as against respondent Stasi Industries on the issue of liability. I conclude that respondent Stasi Industries violated: (i) 6 NYCRR 360.9(a)(1) by operating a solid waste management facility at the site without a permit from the Department; and (ii) 6 NYCRR 360.9(b)(3) by disposing of C&D at the site without a permit from the Department.

I conclude that Department staff's motion for order must be denied as against respondent Stasi and respondent Gold Coast. A hearing is necessary to determine whether these respondents are liable for the charges set forth in the complaint.

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[8] The precise duration of the violations is not established on the record. Nevertheless, the purchase order for the demolition of the two buildings at the site indicates that the Stasi respondents were paid $25,000 in March 2017 at the start of the demolition (Wade affidavit, exhibit W1 [purchase order, approved Mar. 24, 2017]), and Department staff alleges that the C&D remained on site as of the date of the motion for order, December 5, 2019 (Rubinton affirmation ¶ 17).

FURTHER PROCEEDINGS

A hearing is necessary to resolve issues of material fact relating to Department staff's allegations against respondent Stasi and respondent Gold Coast. A hearing is also necessary to determine the appropriate relief with respect to the violations proven against respondent Stasi Industries.

This office will contact the parties after the issuance of this ruling to discuss further proceedings to resolve this matter.

/s/
Richard A. Sherman
Administrative Law Judge

Dated: August 21, 2020
Albany, New York