STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed Revocation of DEC Permit No. 3-5512-00054-00004 Based Upon Alleged Violations

- by -

KARTA CORPORATION,

Respondent.

TARRYTOWN R&T CORPORATION,

Third-Party Respondent.

RULING ON MOTION TO JOIN THIRD-PARTY RESPONDENT

DEC Case No. 3-5512-00054-00009

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Michael S. Caruso, of counsel), for staff of the Department of Environmental Conservation.

-- Michele Marianna Bonsignore, for respondent Karta Corporation

-- Stephan Wislocki, for third-party respondent Tarrytown R&T Corporation

Respondent Karta Corporation moves pursuant to 6 NYCRR 622.10 and CPLR 1001(a) for a ruling joining non-party Tarrytown R&T Corporation ("TRAT") as a third-party respondent in the above referenced Departmental enforcement proceeding. For the reasons that follow, Karta's motion is denied.

Proceedings

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Karta by service of a May 29, 2007 notice of intent to revoke Karta's May 3, 2006 permit for a solid waste management facility located at 1011-1017 Lower South Street, Peekskill, New York (DEC Permit No. 3-5512-00054-00004). Department staff seeks to revoke the permit based upon alleged violations of the conditions of the permit, as well as violations of 6 NYCRR part 360 ("Part 360"), which implements Environmental Conservation Law ("ECL") article 27.

At a hearing held on October 3, 2007, before the undersigned presiding Administrative Law Judge ("ALJ"), TRAT successfully petitioned for limited intervention into this proceeding to protect its interests as a potential operator of the facility (see ALJ Ruling on Motion to Intervene, Oct. 17, 2007). After the Commissioner denied Department staff's motion for leave to appeal from the October 17, 2007 ALJ ruling, the proceeding was adjourned pending reassignment of staff counsel and further discovery.

After reassignment to the present staff counsel, and the completion of discovery, Department staff filed a statement of readiness for adjudicatory hearing on October 29, 2008 (see 6 NYCRR 622.9). During a conference call conducted to schedule the hearing, counsel for TRAT informed the parties that TRAT intended to withdraw from the proceeding. TRAT based its decision on a change in its economic interests in the facility. Accordingly, on November 6, 2008, TRAT filed with the ALJ and served upon the parties a notice of withdrawal from the proceeding.

On November 12, 2008, Karta filed the present motion seeking to join TRAT as a third-party respondent in this proceeding. Timely responses in opposition to Karta's motion were filed by Department staff and TRAT.

Upon my authorization, Karta filed a timely reply to TRAT's opposition. Thereafter, TRAT and Karta traded emails further arguing the motion. Department staff correctly noted that the emails were not authorized and urges that they be ignored. I have nonetheless accepted the emails on the motion.

Discussion

Joinder of TRAT as a Third-Party Defendant

On its motion and in its reply, Karta argues that TRAT should be joined as a third-party defendant. In support of this argument, Karta relies upon CPLR 1007 and case law applying that provision.

It is well-settled Departmental law, however, that enforcement proceedings pursuant 6 NYCRR part 622 ("Part 622") are not an appropriate forum for litigating third-party claims between respondents and third-party defendants (see Matter of Huntington & Kildare, Inc., Ruling of the Chief ALJ, Nov. 15, 2006, at 4 [2006 WL 3380420, *3]; see also Matter of Frie, Commissioner's Order, Dec. 12, 1994, concurring with ALJ Hearing Report, at 6 [1994 WL 734523, *7]; Matter of Universal Waste,

Inc., Commissioner's Second Interim Decision, Aug. 16, 1989, at 1 [1989 WL 162822, *1]). Third-party claims arising from a Part 622 proceeding must be pursued in an action in court pursuant to CPLR article 14 (see Universal Waste, at 1 [1989 WL 162822, *1]). Accordingly, to the extent Karta relies upon CPLR 1007 to join TRAT to this proceeding, the application is rejected.

Joinder of TRAT as a Necessary Party

In the alternative, Karta argues that TRAT should be joined to this proceeding as a necessary party under CPLR 1001(a). Karta asserts that TRAT has an economic interest in the facility that might be adversely affected by this enforcement proceeding. Karta points out that TRAT has entered into a Management Services Agreement ("MSAT") and land leases with Karta whereby TRAT would be the operator of the facility upon approval of the MSAT by the federal bankruptcy court overseeing the reorganization of Karta, and the Department's approval of Karta and TRAT's joint application for transfer of the facility's permit to operate to TRAT. Karta contends that TRAT's economic interest in operating the facility would be adversely affected if the permit is revoked as a result of this proceeding. In support of its application, Karta points out that TRAT relied upon this same economic interest when it successfully petitioned to intervene (see Ruling on Motion to Intervene, at 2-3).

As a threshold matter, TRAT argues that motions to join necessary parties are not authorized under the current version of Part 622. TRAT's argument is premised upon the circumstance that provisions concerning joinder of necessary parties were removed from Part 622 when it was amended in 1994. The revisions referenced, however, do not compel the conclusion that joinder motions are not allowed under the current Part 622 (see Matter of Gramercy Wrecking and Envtl. Contrs., Inc., ALJ Ruling, Jan. 14, 2008, at 7 [whether joinder under CPLR 1001(a) is available under Part 622 is an open question]; Huntington, at 4 [2006 WL 3380420, *3] [same]; see also Frie, at 5 [post-amendment decision addressing necessary party defense on the merits]). The pre-1994 version of Part 622 did not expressly authorize motions to join necessary parties. Instead, it provided that "[n]onjoinder of a necessary party as defined by the CPLR is a ground for dismissal of the hearing without prejudice unless the hearing officer, in the interest of justice, allows the hearing to proceed without such party" (6 NYCRR former 622.12[c][2]). Thus, at most, former Part 622 implicitly authorized motions to join necessary parties.

The current version of Part 622 does not contain a provision similar to former section 622.12(c)(2). Instead, it

contains an expanded section governing motions in general (see 6 NYCRR 622.6[c]). Section 622.6(c) otherwise leaves to other provisions of Part 622 and other sources of law the form, content, and relief available in motions under section 622.6(c). CPLR provisions are often consulted where Part 622 is silent concerning available procedures and standards governing motions (see, e.g., Matter of Makhan Singh, Commissioner's Decision and Order, March 19, 2004, at 2 [2004 WL 598989, *1]; Gramercy, at 8).[1] While current Part 622 does not expressly authorize motions to join necessary parties, it does not expressly prohibit them either. This is in contrast to some motions that are prohibited under the regulations (see, e.g., 6 NYCRR 622.9[b][3] [prohibiting bills of particulars]).

In any event, it is not necessary to determine whether motions to join necessary parties are available under Part 622. Even assuming without deciding that they are authorized, Karta has failed to establish that TRAT should be joined as a necessary party. Under CPLR 1001(a), "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (see also Gramercy, at 8).[2] The failure of a plaintiff to join a

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[1] When Part 622 was amended in 1994, the intent was to establish clear procedural rules for the exercise of the parties' substantive rights, while leaving the content of those substantive rights to other sources of law (see Feller, DEC's New Hearing Rules, 5 Environmental Law in New York [Matthew Bender & Co., Inc.], April 1994, at 60 [referencing the 6 NYCRR 622.6 General Rules of Practice, which includes motion practice]). The amendments were also intended to preserve the flexibility of ALJ's to deal with particular situations that arise in a way that preserves the overall fairness of the process, subject to the Commissioner's appellate review (see id. 59). Reading the omission of the provisions concerning joinder as prohibiting their consideration under current Part 622 is not consistent with the intent underlying the 1994 amendments.

[2] As correctly noted by Department staff, the statements of the standard for joinder of necessary parties enunciated in Matter of Universal Waste, and in Huntington, which relied on the standard enunciated in Universal Waste, are imprecise. The Universal Waste standard merges subdivisions (a) and (b) of CPLR 1001. In this case, the precise standard set out in CPLR 1001 is used. Pursuant to CPLR 1001(a), a non-party is considered to be a necessary party if (1) complete relief is to be accorded

person who ought to be a party "is a ground for dismissal of an action without prejudice unless a court allows the action to proceed without that party under the provisions of [CPLR 1001]" (CPLR 1003). Among the factors considered when determining whether an action may proceed in the absence of a necessary party are (1) the prejudice that may accrue from the nonjoinder to the defendant, and (2) whether an effective judgment may be rendered in the absence of the person who is not joined (see CPLR 1001[b]).

On this motion, TRAT argues that its economic interests in the facility and the permit at issue have substantially changed. Its potential interest as an operator under the MSAT and its record of compliance at the facility, which served as the bases for its motion to intervene, depend upon the bankruptcy court's approval of the reorganization plan, and the Department's approval of a transfer of the subject permit to TRAT. Although the reorganization plan has been approved, the transfer of the permit has not.[3] TRAT has reached the conclusion that it is "improbable and unrealistic to expect that the MSAT will ever actually be implemented" (TRAT Affirm in Opposition, at 2). Accordingly, TRAT has concluded that it no longer has an interest in the outcome of the proceeding.

TRAT's putative interest in the facility, although sufficient to warrant granting TRAT's application to intervene, is nonetheless insufficient to support the conclusion that it is a necessary party to this proceeding. Presently, TRAT is neither a property owner nor permit holder with respect to the facility. Thus, it is not a necessary party on these grounds (see Matter of Baker v Town of Roxbury, 220 AD2d 961, 963 [3d Dept 1995], lv denied 87 NY2d 807 [1996] [owner of subject property and holder of licence a necessary party]; Hitchcock v Boyack, 256 AD2d 842, 844 [3d Dept 1998] [non-party property owners are necessary parties]; Matter of New York City Audubon Socy., Inc. v New York State Dept. of Envtl. Conservation, 262 AD2d 324 [2d Dept 1999] [permit holder is a necessary party to a

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between parties who are parties to the action or (2) the non-party might be inequitably affected by a judgment (see CPLR 1001[a]). If a non-party is a necessary party, prejudice to the defendant is then considered, among other things, in determining whether to proceed without the non-party (see CPLR 1001[b]).

[3] The Department has indicated that it will not consider the application to transfer the permit until the present enforcement proceeding is completed.

proceeding seeking revocation of a permit]; Matter of Town of Preble v Zagata, 250 AD2d 912, 913 [3d Dept 1998] [same]).

To the extent TRAT is responsible for environmental violations at the site, as alleged by Karta, its relationship to this proceeding is as a joint tort-feasor. Plaintiffs are free, however, to proceed against any or all tort-feasors (see Hecht v City of New York, 60 NY2d 57, 62 [1983]). A non-party joint tort-feasor is neither an indispensable nor a necessary party in a proceeding against a named tort-feasor (see Siskind v Levy, 13 AD2d 538, 539 [2d Dept 1961]). Thus, Department staff may proceed with or without TRAT as co-respondent. Staff has not, however, exercised its prosecutorial discretion to bring TRAT in at this time.

On the other hand, Karta is the owner of the facility and permit holder. As such, complete relief can be granted to the Department in the event it prevails on the allegations of its complaint.

In addition, TRAT will not be inequitably affected by any judgment in this proceeding (see CPLR 1001[a]). Among the purposes of the CPLR 1001(a) joinder rule is a concern for the due process rights of non-parties who have not been provided notice of a proceeding that might adversely affect their rights or interests (see Matter of Martin v Ronan, 47 NY2d 486, 490 [1979]). In this case, TRAT not only had notice of the enforcement proceeding, it successfully intervened. TRAT has now concluded that it no longer has a substantial interest in the matter and has affirmatively withdrawn from the case. Accordingly, it cannot be said that proceeding without TRAT as a co-respondent will inequitably prejudice TRAT's interests. Accordingly, TRAT is not a necessary party under CPLR 1001(a).

Even assuming TRAT is a necessary party, the matter should proceed even without TRAT as a co-respondent (see CPLR 1001[b]). To the extent Karta seeks to establish TRAT's responsibility as a defense to any of the alleged environmental violations that have occurred at the facility, Karta is free to subpoena TRAT as a witness (see Huntington, at 5 [2006 WL 3380420, *3]).[4] TRAT need not be joined as a co-respondent for this purpose. In addition, an effective judgment, either modifying or revoking the permit, may be issued if the Department

[4] In so concluding, I do not pass on this motion on Department staff's argument that Karta is strictly liable for any violations established at the facility.

carries its burden of proof (see CPLR 1001[b}).

Ruling

Karta's motion to join TRAT as a third-party defendant in this proceeding is denied.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 8, 2008
Albany, New York

TO: Attached Service List