STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Noncompliant Waste Tire Stockpile Located Along 17128 Ives Street Road Extension, Watertown, New York, and Owned or Operated by,

CARLISLE KELLNER,

Respondent.

RULING ON MOTION FOR DEFAULT JUDGMENT

VISTA Index No. R6-20070613-26

Appearances:

- Alison H. Crocker, Deputy Commissioner and General Counsel (by Charles E. Sullivan, Jr., Esq., of counsel) for staff of the New York State Department of Environmental Conservation.

- No appearance for Carlisle Kellner, respondent.

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by the service of a notice of motion and motion for an order without hearing against respondent Carlisle Kellner ("respondent"). The motion for order without hearing was served in lieu of a notice of hearing and complaint pursuant to title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") § 622.12(a).

Department staff's motion papers, dated July 30, 2007, were initially sent by certified mail, return receipt requested, to respondent at 15217 County Route 155, Adams Center, New York 13606. When the certified mailing was returned to the Department as "Unclaimed/Delivery Refused," staff sent another copy of the motion papers to respondent by first class mail to the same address noted above on August 28, 2007. That mailing was not returned to the Department and no written response to staff's motion from respondent has been received to date. With a cover letter to the Department's Office of Hearings and Mediation Services dated January 9, 2008, Department staff forwarded a copy of its motion papers and requested a default judgment against respondent.

Charges Alleged

Department staff's July 30, 2007 motion alleges that, since at least May 30, 2006, respondent has owned or operated a solid waste management facility having more than 1,000 waste tires without a permit in violation of article 27, title 7 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 360, on property located at 17128 Ives Street Road Extension, Watertown (Jefferson County), New York, having Jefferson County Tax Map Parcel No. 90.19-1-9 (the "facility" or "site").[1] Specifically, Department staff charged that:

A. Respondent violated 6 NYCRR 360-1.7(a)(1) and 360-13.1(b) since at least May 30, 2006 because respondent has never received a solid waste management facility permit to operate the waste storage facility on the site;

B. Respondent violated the provisions of 6 NYCRR 360-13.3(a) since at least May 30, 2006 because respondent operated the site without receiving the Department's approval for any of the following required plans:

1. A site plan that specifies the waste tire facility's boundaries, utilities, topography and structures;

2. A monitoring and inspection plan which addresses such matters as the readiness of fire-fighting equipment and the integrity of the security system;

3. A closure plan that identifies the steps necessary to close the facility;

4. A contingency plan;

5. A storage plan that addresses the receipt and handling of all waste tires and solid waste to, and from, the facility;

6. A vector control plan that provides all waste

[1] See http://www.co.jefferson.ny.us/pdfs/watertown_roll.pdf at p. 195. This public website indicates that, as of 2007, respondent is the current owner of 6.0 acres of property described as a "Junkyard" located at 17128 Ives Street Road in Watertown, having Jefferson County Tax Map Parcel No. 90.19-1-9, and that his current mailing address is 15217 County Route 155, Adams Center, New York 13606.

tires be maintained in a manner which limits mosquito breeding potential and other vectors; and

C. Respondent violated the provisions of 6 NYCRR 360-13.3(a) since at least May 30, 2006 because respondent operated the site without a Department-approved operation and maintenance manual covering the site's activities.

Relief Sought

Department staff's motion maintains that no material issues of fact exist and that the Department is entitled to judgment as a matter of law for the violations alleged. Accordingly, Department staff requests that the Commissioner issue an order finding that:

A. Respondent owns or operates the site;

B. The site is a solid waste management facility;

C. Respondent violated the aforementioned provisions of law since at least May 30, 2006; and

D. As a result of the violations described in staff's motion, respondent owns or operates a noncompliant waste tire stockpile as defined by ECL 27-1901(6).

Additionally, Department staff requests that the Commissioner issue an order directing respondent to:

I. Immediately stop allowing any waste tires to come onto the site in any manner or method or for any purpose, including but not limited to nor exemplified by, acceptance, sufferance, authorization, deposit, or storage;

II. Remove all tires from the site and dispose of them in compliance with 6 NYCRR part 360 within six months after the effective date of the Commissioner's order;

III. Submit to the Department a written report on the removal and disposal of waste tires from the site no later than five calendar days after all such waste tires have been removed from the site and properly disposed of, or no later than five calendar days after six months after the effective date of the Commissioner's order, whichever is earlier;

IV. Pay an assessed penalty of $15,000, the obligation to pay $5,000 thereof being due and owing thirty (30) days

after the effective date of the Commissioner's order, and the obligation to pay the remaining $10,000 being suspended for as long as respondent strictly and fully complies with all terms of the Commissioner's order (and should respondent strictly and fully comply with all terms of the Commissioner's order, then $9,000 of the assessed penalty shall be remitted upon completion of all terms of the order);

V. Upon respondent's violation of the Commissioner's order, to fully cooperate with the State and refrain from any activities that interfere with the State, its employees, contractors, or agents in the event that the State is required to assume responsibility for the abatement of the waste tire stockpiles at the site; and

VI. Undertake such other and further actions as may be determined to be appropriate.

Papers Reviewed

Department staff's motion is brought pursuant to 6 NYCRR 622.12(a), which provides that "[i]n lieu of or in addition to a notice of hearing and complaint, the department staff may serve, in the same manner, a motion for order without hearing together with supporting affidavits reciting all the material facts and other available documentary evidence." Accompanying staff's motion is an attorney brief of Department staff counsel Charles E. Sullivan, Jr., Esq., also dated July 30, 2007, in support of the motion for order without hearing.

Attached as exhibits to the Department's motion are the following: (1) a copy of a deed dated May 15, 1994, from Leland G. Kellner to respondent Carlisle W. Kellner for real property located at 17128 Ives Street Road Extension, Watertown (Jefferson County), New York (Exhibit "A"); and (2) the affidavit of Edward Blackmer, P.E., Environmental Engineer III, Division of Solid and Hazardous Materials, in the Department's Region 6 office, sworn to July 26, 2007 (Exhibit "B") ("Blackmer Affidavit").

Included with the Blackmer Affidavit (Exhibit "B") are three numbered attachments. Attachment "1" to the Blackmer Affidavit consists of six separate color photographs captioned "Photographs of waste tires on the Site on May 30, 2006 contained in Region 6 solid waste file for the Site." Attachment "2" to the Blackmer Affidavit consists of six separate color photographs captioned "Photographs of waste tires on the Site on April 10, 2007 all photographs taken by Gary McCullouch, P.E. in the

presence of Edward Blackmer, P.E." Attachment "3" to the Blackmer Affidavit is a one-page table of information captioned "Waste Tire Fires Occurring in New York Since 1989."

Also accompanying staff's motion is an affirmation captioned "Service Brief" of Department staff counsel Charles E. Sullivan, Jr., Esq., dated January 9, 2008 ("Sullivan Affirmation"). The Sullivan Affirmation describes the methods Department staff utilized to attempt serving its motion papers upon respondent in this matter, initially by certified mail and then by first class mail. As evidence of this, the Sullivan Affirmation includes four supporting exhibits, identified by numbers "1" through "4."

Exhibit "1" is an affidavit of service of Drew A. Wellette, Division of Environmental Enforcement, in the Department's Central Office, sworn to July 30, 2007, attesting to the mailing of staff's notice of motion and motion for order without hearing to respondent, by certified mail, on July 30, 2007. Exhibit "2" is the Department's certified mailing envelope for staff's July 30, 2007 notice of motion and motion for order without hearing in this matter. The envelope indicates that the U.S. Postal Service attempted to deliver the certified mailing to respondent at 15217 County Route 155, Adams Center, New York 13606, on three separate occasions: August 1, 6, and 16, 2007. When this envelope was not successfully delivered to respondent, it was stamped with the notation "Unclaimed/Delivery Refused" by the U.S. Postal Service and was returned to the Department's Central Office on August 27, 2007.

Exhibit "3" is another affidavit of service of Drew A. Wellette, sworn to August 28, 2007, attesting to the mailing of staff's July 30, 2007 notice of motion and motion for order without hearing to respondent, by first class mail, on August 28, 2007. Staff's notice of motion and motion for order without hearing were again sent to respondent at 15217 County Route 155, Adams Center, New York 13606. Exhibit "4" is a copy of the July 30, 2007 cover letter of Department staff attorney Charles E. Sullivan, Jr., Esq., to respondent, along with a copy of staff's notice of motion and motion for order without hearing in this proceeding, both dated July 30, 2007.

The Sullivan Affirmation avers that, as of January 9, 2008, the copy of the July 30, 2007 notice of motion and motion for order without hearing sent by staff to respondent by first class mail on August 28, 2007 has not been returned to the Department (see Sullivan Affirmation, ¶ 4.B.). The Sullivan Affirmation contends that staff's method of serving the motion

papers in this case as described above is proper and satisfies constitutional due process notice requirements in accordance with holdings in Harner v Tioga, 5 NY3d 136 (2005) and Matter of GSI of Virginia, Inc., Order, May 31, 2007 (see Sullivan Affirmation, ¶ 4.B.). According to the Sullivan Affirmation, respondent has failed to file any response to staff's motion for order without hearing or had any contact with the Department and, therefore, staff is entitled to a default judgment pursuant to 6 NYCRR 622.15 (see id. at ¶ 5.B.).

The basis of staff's request for default judgment, as set forth in the Sullivan Affirmation, is respondent's failure to file a response to staff's July 30, 2007 motion for order without hearing (see id.). Department staff's submissions which accompany its motion, indicate that a copy of the notice of motion and motion for order without hearing with supporting papers, as described herein, was sent by first class mail to respondent at 15217 County Route 155, Adams Center, New York 13606, on August 28, 2007, following previous attempts to serve such papers upon respondent at that address by certified mail.

FINDINGS OF FACT

Based upon the papers submitted on this motion, the undisputed facts determinable as a matter of law are as follows:

1. On July 30, 2007, Department staff sent a notice of motion and motion for order without hearing, both dated July 30, 2007, in Department Case No. R6-20070613-26 to respondent at 15217 County Route 155, Adams Center, New York 13606 by certified mail, return receipt requested (see Sullivan Affirmation, Exhibits "1", "2" and "4").

2. On August 1, 6, and 16, 2007, the U.S. Postal Service attempted to serve Department staff's July 30, 2007 notice of motion and motion for order without hearing in this case upon respondent at 15217 County Route 155, Adams Center, New York 13606 by certified mail, return receipt requested (see id. at Exhibit "2").

3. When Department staff's July 30, 2007 motion was not successfully delivered to respondent by certified mail at 15217 County Route 155, Adams Center, New York 13606 after multiple attempts, the envelope containing the motion papers was stamped with the notation "Unclaimed/Delivery Refused" by the U.S. Postal Service and was returned to the Department's Central Office on August 27, 2007 (see id.).

4. On August 28, 2007, Department staff sent its July 30, 2007 notice of motion and motion for order without hearing in this case to respondent at 15217 County Route 155, Adams Center, New York 13606 by first class mail (see id. at Exhibit "3").

5. With respect to the July 30, 2007 notice of motion and motion for order without hearing, staff contends that the time for respondent to serve a response, following the mailing of its motion papers on August 28, 2007, expired on September 23, 2007. As of January 9, 2008, respondent had not submitted any response to staff's motion or had any contact with the Department (see id. at ¶ 5.B.).

DISCUSSION

Nature of the Motion

Department staff maintains that it properly served the July 30, 2007 motion for order without hearing in lieu of a complaint, and respondent has failed to file a timely, or any, response to the motion (see 6 NYCRR 622.12[a]). Department staff contends that respondent's failure to respond or otherwise appear in this action entitles it to a default judgment pursuant to 6 NYCRR 622.15. Thus, this motion will be treated as one seeking a default judgment pursuant to 6 NYCRR 622.15.

Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain the following:

1. proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; and

2. proof of the respondent's failure to appear or failure to file a timely answer; and

3. a proposed order.

Proof of Service

In accordance with the Department's uniform enforcement regulations, staff may commence an administrative enforcement proceeding by service of a motion for order without hearing (in lieu of or in addition to a notice of hearing and complaint) (see 6 NYCRR 622.12[a]). Service of a notice of motion for order without hearing, which serves as the complaint in this matter, "must be by personal service consistent with the CPLR or by certified mail" (see 6 NYCRR 622.3[a][3]).

As part of its motion for order without hearing, Department staff must file proof of service of the motion and supporting papers upon respondent with the Chief Administrative Law Judge ("ALJ") of the Department's Office of Hearings and Mediation Services (see 6 NYCRR 622.12[a]). A respondent's failure either to respond to or otherwise answer staff's motion constitutes a default (see 6 NYCRR 622.12[b]). Under those circumstances, Department staff may move for a default judgment.

As appears from the Sullivan Affirmation (and Exhibits attached thereto), Department staff initially attempted to serve its notice of motion and motion for order without hearing in this proceeding on July 30, 2007 by mailing copies of same via certified mail, return receipt requested, to respondent at 15217 County Route 155, Adams Center, New York 13606 (see Sullivan Affirmation, Exhibits "1", "2" and "4").[2] This method of service would be consistent with the provisions of 6 NYCRR 622.3(a)(3). The Sullivan Affirmation notes, and Exhibit "2" demonstrates, that the U.S. Postal Service made several attempts to deliver staff's July 30, 2007 motion papers to respondent at 15217 County Route 155, Adams Center, New York 13606 by certified mail, return receipt requested (see id., Exhibit "2").

When those delivery attempts failed, the envelope containing staff's motion papers was stamped with the notation "Unclaimed/Delivery Refused" by the U.S. Postal Service and was returned to the Department's Central Office on August 27, 2007 (see id.). As a result, the Sullivan Affirmation avers that Department staff then sent its July 30, 2007 notice of motion and motion for order without hearing to respondent at 15217 County Route 155, Adams Center, New York 13606, by first class mail on August 28, 2007 (see id., Exhibit "3"). The Sullivan Affirmation contends that this method of service is acceptable here, relying upon Harner v Tioga, 5 NY3d 136 (2005) and Matter of GSI of Virginia, Inc., Order, May 31, 2007 (see Sullivan Affirmation, ¶ 4.B.).

I disagree. As 6 NYCRR 622.3[a][3] clearly states, service of a notice of motion for order without hearing:

> "must be by personal service consistent with the CPLR or by certified mail. Where service is by certified mail, service shall be complete when

[2] This address is consistent with the tax assessment information for the ownership of the subject property as referenced on the pertinent Jefferson County website (see fn 1 herein).

> the notice of [motion for order without hearing] is received. If personal service and service by certified mail is impracticable, upon application by the staff the ALJ may provide for an alternative method of service consistent with CPLR section 308.5" (see 6 NYCRR 622.3[a][3]) (emphasis added).

In this proceeding, when the certified mailing of the July 30, 2007 motion for order without hearing was stamped "Unclaimed/Delivery Refused" and subsequently returned to the Department, staff followed that by sending its motion papers to respondent by first class mail which was not returned. However, staff's motion does not indicate that personal service of its motion papers upon respondent was ever attempted prior to the use of first class mail, nor does it explain why personal service upon respondent was, or would be, "impracticable" here (see 6 NYCRR 622.3[a][3]). Furthermore, staff did not make an application for use of an alternative method of service in this proceeding when the certified mailing attempts failed (see id.).

Department staff notes correctly that the Court of Appeals has upheld service by ordinary first class mail in circumstances where certified mail was returned "Unclaimed" as satisfying constitutional due process notice requirements. In Harner v County of Tioga, 5 NY3d 136 (2005), notices of foreclosure proceedings commenced by the County sent to the property owner's address appearing in the tax rolls by certified mail pursuant to Real Property Tax Law § 1125(1)(a)[3] were returned marked "Unclaimed," but ordinary mailings to that address were not returned.

> "Only the certified mailings were returned as 'unclaimed,' which for purposes of the Postal Service means that the '[a]ddresee abandoned or failed to call for [the] mail'. . . Given the implication of such endorsement -- which does not on its face indicate that an address is invalid as the notation 'undeliverable' implies -- and that none of the first class mailings were returned, the County reasonably believed that Harner was attempting to avoid notice by ignoring the certified mailings" (see id. at 140-141) (citation omitted).

[3] Real Property Tax Law § 1125(1)(a) authorizes notice of commencement of a proceeding thereunder by first class mail.

In that case, the Court of Appeals found a difference between a mailing being returned by the Postal Service marked as "Undeliverable" and one marked as "Unclaimed" (see Harner, supra, at 140-141). The former connotes an invalid address while the latter implies avoidance of a properly addressed mailing. Under the circumstances of that case, the Court of Appeals upheld the service of papers commencing a Real Property Tax Law proceeding by first class mail as satisfying due process when service by certified mail had failed (see id. at 140).

However, in contrast to the provisions of Real Property Tax Law § 1125(1)(a), the Department's regulations do not authorize commencement of an enforcement proceeding by first class mail; commencement "must be by personal service consistent with the CPLR or by certified mail" unless an alternative method is provided by the ALJ "upon application by" Department staff (see 6 NYCRR 622.3[a][3]) (emphasis added). In this case, it does not appear from staff's papers that it attempted to serve its July 30, 2007 motion upon respondent in person at any time, nor did staff make an application for an alternative method of service of its motion prior to requesting a default judgment against respondent.

In a prior Department enforcement matter involving a similar question of service, the Acting Commissioner cautioned staff "that in the future, however, an application for an alternative method of service should be made to the ALJ prior to its use" (see Matter of Mario Pugliese, Order of the Acting Commissioner, June 8, 2005) (emphasis added) (holding that staff's use of registered mail for service upon a respondent in Canada was "the functional equivalent of the certified mail method of service authorized by the Department's regulations" where use of certified mail was not available in Canada).[4]

Moreover, the facts and circumstances in the other case cited by Department staff in support of its argument of proper service in this proceeding, Matter of GSI of Virginia, Inc., Order, May 31, 2007, are easily distinguishable here. In that Department enforcement proceeding, respondent was a defunct non-domiciliary corporation, formerly incorporated in the Commonwealth of Virginia, that was the record owner of real property located in Syracuse (Onondaga County), New York. Due to

[4] Additionally, proof of receipt of the documents that commenced the proceeding was independently established by a letter from Canada Post confirming their delivery date, and by respondent's own admission to Department staff of their receipt (see Matter of Mario Pugliese).

the unauthorized, foreign status of the corporate respondent, coupled with the number of different addresses associated with that corporation, Department staff was compelled to expend a significant effort in an attempt to serve a motion for order without hearing upon respondent in that case (see Matter of GSI of Virginia, Inc., ALJ's Hearing Report on Motion for Order Without Hearing, April 27, 2007, at 10-18). Notably, Department staff could not, in the first instance, effect personal service of its motion upon the corporate respondent because it did not have any representatives of record located within the state of New York (see id. at 14).

Staff's attempts at service in that case included sending its motion papers by certified mail over a two-year span to: (i) three different addresses in the Commonwealth of Virginia for the corporate respondent, including its former attorney as registered agent; (ii) the Clerk of the Virginia State Corporation Commission; (iii) an address in Syracuse, New York for the respondent on file with the Onondaga County Clerk, Office of Real Property Tax Assessment; and (iv) an address in Southern Pines, North Carolina for the corporation's president (see id. at 11-16). Staff's efforts failed because all of the certified mailings were returned to the Department undelivered, either with the notation "Not Deliverable as Addressed/Unable to Forward," or with the notation "Unclaimed" (see id. at 16-18).[5] When the certified mailings to the corporation's president were returned to the Department as "Unclaimed," staff followed that mailing to him by the use of regular mail which was not returned (see id.).

Under those circumstances, as the ALJ assigned to that case I determined, and the Commissioner confirmed, that the unique facts of that proceeding presented a strong case for holding that the service procedure ultimately utilized by Department staff had satisfied the requirements of 6 NYCRR 622.3(a)(3) and, in turn, due process (see Matter of GSI of Virginia, Inc., Order, May 31, 2007). In particular, my hearing report noted, in relevant part, as follows:

> "Based upon the fact that Department staff's October 25, 2006 first class mailing of the within motion papers and a copy of my March 13,

[5] Staff did not follow the strict mandates of Business Corporation Law § 307 for serving papers upon an unauthorized foreign corporation by simply delivering a copy of the motion papers commencing its action against the corporate respondent to the New York Secretary of State (see id. at 16).

> 2007 letter to respondent's Southern Pines, North Carolina address have not been returned, it is reasonable to conclude that respondent received the motion but is attempting to avoid notice of this proceeding by ignoring the certified mailing of the motion in September 2006. While utilizing the provisions of BCL 307 would, ordinarily, have been the easier method of service upon an un-authorized foreign corporation such as respondent, under the circumstances presented here, Department staff has demonstrated compliance with service by certified mail pursuant to 6 NYCRR 622.3(a)(3) (see Harner, supra). As such, Department staff acquired jurisdiction over respondent GSI of Virginia, Inc. in this matter" (see Matter of GSI of Virginia, Inc., ALJ's Hearing Report, April 27, 2007, at 18) (footnote omitted).[6]

In the present matter, however, staff has not demonstrated that it served its motion for order without hearing upon respondent in a manner consistent with the provisions of 6 NYCRR 622.3(a)(3). This is particularly true with respect to staff's apparent failure to attempt to serve its July 30, 2007 motion upon respondent in person. According to public records noted by staff, respondent has an address in Adams Center (Jefferson County), New York which is located less than 10 miles away from the City of Watertown where the Department's Region 6 office is headquartered (see fn 1 herein). Nevertheless, in its motion papers, staff fails to indicate how or why personal service upon respondent was, or would be, "impracticable" given respondent's proximity to the Department's Region 6 office.

In this case, Department staff was required to attempt to serve its motion papers upon respondent in person and, if that method proved to be "impracticable," coupled with its previous attempts at certified mail service, staff should then have made an application to the ALJ for an alternative method of service (see 6 NYCRR 622.3[a][3]; see also Matter of Mario Pugliese, Order of the Acting Commissioner, June 8, 2005).

---

[6] The footnote omitted from this citation made reference to, and quoted, a telephone voicemail message that was left for me on behalf of the corporation's president indicating, among other things, that he had received the Department's mailings in Southern Pines, North Carolina (see Matter of GSI of Virginia, Inc., ALJ's Hearing Report, April 27, 2007, at 13, fn 6).

CONCLUSION

Based upon its submissions, Department staff did not demonstrate that it complied with the provisions for service of its motion papers upon respondent as required by 6 NYCRR 622.3(a)(3). Accordingly, staff's motion for default judgment against respondent on its July 30, 2007 motion for order without hearing is hereby dismissed, without prejudice.

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

Dated: January 24, 2008
Albany, New York

TO: Charles E. Sullivan, Jr., Esq. (Via Ordinary Mail)
New York State Department of
Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500

Carlisle Kellner (Via Certified and Ordinary Mail)
15217 County Route 155
Adams Center, New York 13606

Carlisle Kellner (Via Certified and Ordinary Mail)
17128 Ives Street Road
Watertown, New York 13601