

In the Matter of the Alleged Violation  
of Article 27 of the Environmental  
Conservation Law (ECL) by:

**RULING OF THE  
ADMINISTRATIVE  
LAW JUDGE**

**EDWARD C. SMITH AND KORNELL TRUCKING,**

Respondents.

No. R3-20000127-19

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Summary

By written motion dated November 19, 2004, Staff of the Department of Environmental Conservation ("Department Staff") requests that a default judgment be issued against Kornell Trucking, Inc., pursuant to Section 622.15 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR 622.15). Kornell Trucking was named as one of two Respondents in a notice of hearing and complaint dated October 14, 2004.

Staff's motion cannot be granted because the complaint, though properly served, is defective. Kornell Trucking is not identified by name in either of the two causes of action, and the complaint does not indicate how liability is apportioned between Kornell Trucking and the other Respondent, Edward C. Smith. The complaint does not specify what Kornell Trucking did to cause or contribute to the alleged violations. Furthermore, the complaint alleges violations that are not confirmed by the referenced citations to the ECL and its supporting regulations, as explained below. The errors in the complaint must be corrected and a new complaint must be served, thus affording Kornell Trucking a second opportunity to respond before any default judgment is taken.

Background

Department Staff initiated this action by a notice of hearing and complaint dated October 14, 2004. According to an affidavit of service, the papers were sent by certified mail to Kornell Trucking's business address in Haines Falls on October 19. The domestic return receipt indicates that they were delivered to that address on October 28.

According to 6 NYCRR 622.4(a), Kornell Trucking had 20 days from receipt of the complaint to serve an answer on the Department. This deadline passed on November 17 (not November 8,

the date in Staff's motion, which is 20 days from the complaint's mailing.)

According to Staff's papers, Kornell Trucking failed to file an answer to the complaint or have any other contact with the Department. Staff's papers also indicate that Kornell Trucking failed to appear at a pre-hearing conference that was announced in the hearing notice for 10 a.m. November 15, 2004, at the Department's Region 3 office in New Paltz.

By papers dated November 19, 2004, Department Staff moved for a default judgment against Kornell Trucking. Staff requested a Commissioner's order confirming the default, assessing a \$150,000 penalty, and directing the removal of all solid waste from a Saugerties property that, according to the complaint, is an unpermitted solid waste management facility. (Unlike the monetary penalty, the removal of the waste and its lawful disposal, within 12 months of a Commissioner's order, was not requested explicitly in the complaint.)

Under a cover letter of November 22, 2004, Department Staff sent its default motion and proposed order to James McClymonds, the Department's chief administrative law judge, who then assigned the matter to me. Staff also sent a copy of its motion papers to Kornell Trucking by certified mail, return receipt requested.

Alerting Staff attorney Jonah Triebwasser to my assignment, I discovered that, due to an apparent typographical error, Mr. Triebwasser's phone number - - as included in both the motion and Mr. Triebwasser's supporting affirmation - - was incorrect; in fact, it was not a Department number at all. I wrote a letter dated December 1, 2004, pointing this error out to both parties, and giving Kornell Trucking an additional opportunity (until December 10) to respond to the motion. I provided Kornell Trucking my address and telephone number, but to date have not heard from it or anyone on its behalf.

The motion for default judgment does not indicate where this matter stands in relation to the other Respondent, Edward C. Smith, who, according to the complaint, apparently owns and resides at the Saugerties property.

### Discussion

The complaint in this matter (included with the hearing notice as Exhibit "C") names two Respondents, Edward C. Smith and Kornell Trucking. The complaint alleges that Mr. Smith is

located at and has property at 9 Myer Lane in Saugerties, and that Kornell Trucking is located at North Lake Road in Haines Falls.

The first cause of action states that on December 19, 1996, the Department inspected the Saugerties property and observed more than 70 cubic yards of non-exempt construction and demolition (C&D) debris that included, but was not limited to, unprocessed and processed C&D, carpet, wood, painted wood, asphalt, rock, brick, metals, rags, cardboard, concrete, and unprocessed wood caulking tubes. The complaint describes this situation as in violation of 6 NYCRR 360.17(a)(1)(i), apparently a mistaken reference to 6 NYCRR 360-1.7(a)(1)(i), which prohibits the construction or operation of a solid waste management facility, or any phase of it, except in accordance with a valid Department permit. Though the property is referenced as "Respondent Smith's," the complaint does not name either Smith or Kornell Trucking as the responsible party, leaving it open to question whether one or both is being charged.

The second cause of action states that on or about and between September 17 and December 17, 1996, "the Respondent [again not identified by name, so it could be Smith or Kornell Trucking] did cause the release of more than 70 cubic yards of solid waste into the environment" at 7 Myer Lane [not 9 Myer Lane, the previously referenced address] in Saugerties. This is charged as a violation of ECL Section 27-0703, though the relevance of that section is not explained. ECL Section 27-0703 identifies various powers and duties of the Department in relation to solid waste disposal, but not duties of the general public that would have been breached by the conduct described in the complaint.

The Department's motion papers adequately demonstrate that Kornell Trucking defaulted both by failing to answer the complaint and by failing to appear at the scheduled pre-hearing conference. The affidavit of mail service, signed by Jennifer Cutter (Exhibit "A"), coupled with a copy of the domestic return receipt (Exhibit "B"), demonstrate that the complaint was mailed to and received by an agent of Kornell Trucking. The failures to file an answer and appear at the scheduled pre-hearing conference are demonstrated by the supporting affirmation of Staff attorney Jonah Triebwasser and the supporting affidavit of Staff solid waste engineer David Pollock (Exhibit "D").

According to Mr. Triebwasser's affirmation, the factual allegations of the complaint "demonstrate that the Respondent [Kornell Trucking] has violated ECL Article 27 and 6 NYCRR

360.17(a)(1)(i) [again, apparently a mistaken reference to 6 NYCRR 360-1.7(a)(1)(i)] by causing the release of more than 70 cubic yards of solid waste into the environment at 7 Myer Lane, Saugerties, New York, a site operating without a valid permit for a solid waste management facility." In fact, as noted above, Kornell Trucking is not identified by name in relation to either of the complaint's two causes of action. The complaint does not indicate what Kornell Trucking did to cause or contribute to the alleged violations, and therefore the complaint fails to state a claim for which relief may be granted. Finally, the first cause of action is based on an incorrect regulatory citation, and the second cause of action is based on a statutory citation that has no apparent relevance to the conduct described.

To the extent the complaint is defective, its errors must be corrected before service of the complaint can be used as a basis for taking a default judgment. Granting this motion, and having the Commissioner sign Staff's proposed order, would have the effect of repeating and, in effect, ratifying Staff's mistakes. Rather than allow this, the proper course is to deny the default and direct that Staff develop and serve a new, corrected complaint, in effect re-starting this action.

Ruling

The motion for default judgment is denied. Department Staff shall prepare and serve a new complaint.

Albany, New York  
December 30, 2004

/s/  
Edward Buhrmaster  
Administrative Law Judge

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