

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the matter of the Alleged Violations of Environmental Conservation Law of the State of New York (ECL) article 23, title 27, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 422, and DEC Permit No. 6-2126-00014/00001 by

Ruling on Staff's motion for Order without hearing

DEC Case No.
R6-20060915-75

LEITZ ENTERPRISES, INC.
Town of Frankfort, Herkimer County,

Respondent.

Proceedings

With service of a notice of motion for order without hearing dated December 18, 2006 and other supporting papers, by certified mail return receipt requested, Staff from the Department's Region 6 Office (Department staff) commenced the captioned enforcement action against Leitz Enterprises, Inc. (Leitz Enterprises). With the December 18, 2006 notice of motion, Staff included an affidavit by Jerome E. Zaykoski, Certified Professional Geologist, and Mined Land Reclamation Specialist II for Region 6 sworn to December 15, 2006 with Attachments A through H, inclusive. Staff also included a motion for order without hearing and memorandum in support of the motion by James T. King, Esq., then Regional Attorney. The motion and memorandum are dated December 18, 2006; Mr. King's memorandum includes Attachments I, J, and K.

Department staff may commence an enforcement action by serving a motion for order without hearing in lieu of a notice of hearing and complaint (see 6 NYCRR 622.12[a]). Service of Staff's motion for order without hearing in lieu of a notice of hearing and complaint may be by either personal service consistent with the Civil Practice Law and Rules (CPLR) or by certified mail. Where, as here, service is by certified mail, service will be complete when the motion is received. (See 6 NYCRR 622.3[a][3] and 622.3[b].) Consistent with the regulations (see 6 NYCRR 622.12[b]), Staff's December 18, 2006 notice of motion advised Leitz Enterprises to file a response, including all proof and supporting affidavits, with the chief administrative law judge within twenty days after receiving the motion, and that the failure to respond within the prescribed

time would constitute a default and waiver of Leitz Enterprises' right to a hearing.

With a cover letter dated January 9, 2007, Mr. King forwarded a copy of Staff's motion papers to the Office of Hearings and Mediation Service. In addition to the papers described above, Mr. King provided an affidavit of service by Beth Anne Widrick sworn to January 9, 2007 and copies of the certified mail receipt and track/confirmation for item number 7005-1820-0000-1927-6240. In the January 9, 2007 cover letter, Mr. King stated that Leitz Enterprises did not reply to the December 18, 2006 motion and requested a ruling from an administrative law judge (ALJ) on the merits of Staff's unopposed motion. Subsequently, the matter was assigned to ALJ Daniel P. O'Connell.

Allegations

Department staff asserts that it issued Leitz Enterprises of 162 McIntyre Road, Frankfort (Herkimer County), New York, a mined land reclamation renewal permit (Permit No. 6-2126-00014/00001) on September 1, 2003. The permit is effective until August 31, 2008 and, according to Staff, authorizes Leitz Enterprises to mine topsoil, sand, and gravel from a 35-acre surface mining facility located on Gulf Road in the Town of Frankfort. A copy of the permit is identified as Attachment A to Mr. Zaykoski's December 15, 2006 affidavit.

Jerome Zaykoski is a Certified Professional Geologist and the Mined Land Reclamation Specialist II in the Department's Region 6 Office. Mr. Zaykoski has worked in the Division of Mineral Resources since May 1986. According to Mr. Zaykoski's December 15, 2006 affidavit, he inspected the mining operations on Gulf Road in Frankfort (Herkimer County) on July 28, 2006. During his inspection, Mr. Zaykoski was accompanied by John J. Leitz, who is the Secretary/Treasurer for Leitz Enterprises.

In the December 18, 2006 motion, Department staff alleges that Leitz Enterprises violated the terms and conditions of the September 1, 2003 permit. On July 28, 2006, Mr. Zaykoski observed that mine waste consisting of overburden and till material was stockpiled within 25 feet of the southern property line in violation of general condition No. 10 and special condition No. 5. In addition, Mr. Zaykoski observed that stormwater had carried material and sediment from the stockpiled mine waste across the southern property line and onto the adjacent property in violation of special condition No. 7.

Attachments E through H, inclusive, are photographs which show the mine waste material and its location within 25 feet of the property line. Referring to ECL 71-1307(1), Department staff has requested a total civil penalty of \$17,000 of which amount \$7,000 would be suspended and the balance payable immediately pending Leitz Enterprises' compliance with general condition No. 10 and special conditions Nos. 5 and 7.

Leitz Enterprises' Response

As noted above, the December 18, 2006 notice of motion advised Leitz Enterprises that it had 20 days from receiving the motion to file a response with the Chief ALJ and with Mr. King. The notice advised further that the failure to file a response would constitute a default and a waiver of Leitz Enterprises' right to a hearing. In his January 9, 2007 cover letter, Mr. King states that Department staff did not receive any response from Leitz Enterprises. In addition, I note that the Office of Hearings and Mediation Services did not receive any response from Leitz Enterprises. Accordingly, Department staff's December 18, 2006 motion for order without hearing is unopposed.

Findings of Fact

Based upon the papers submitted with this motion, the undisputed facts determined as a matter of law are:

1. Department staff served its December 18, 2006 notice of motion for order without hearing and supporting papers upon Leitz Enterprises by certified mail, return receipt requested.
2. Leitz Enterprises received Staff's December 18, 2006 notice of motion and supporting papers on December 19, 2006.
3. Department staff issued John Leitz of 162 McIntyre Road, Frankfort (Herkimer County), New York, a mined land reclamation renewal permit (Permit No. 6-2126-00014/00001) on September 1, 2003. The permit is effective until August 31, 2008 and authorizes John Leitz, as the permittee, to mine topsoil, sand, and gravel from a 35-acre surface mining facility located in the Town of Frankfort.
4. Jerome Zaykoski is a Certified Professional Geologist, and is the Mined Land Specialist II in the Department's Region 6 Office. Mr. Zaykoski has worked in the Department's

Division of Mineral Resources since May 1986. Mr. Zaykoski inspected the mining facility on July 28, 2006. During his inspection, Mr. Zaykoski was accompanied by John J. Leitz, who is the Secretary/Treasurer for Leitz Enterprises.

5. General condition No. 10 of Mr. Leitz' renewal mined land reclamation permit prohibits the permittee from deviating or departing from the approved mined land use plan. In addition, special condition No. 5 of the renewal mined land reclamation permit prohibits any mining activities from occurring within 25 feet of any adjacent property line or right-of-way.
6. On July 28, 2006, Mr. Zaykoski observed mine waste consisting of overburden and till material in stockpiles located less than 25 feet from the southern property line.
7. Special condition No. 7 of the renewal mined land reclamation permit prohibits the permittee from allowing surface water to drain from the site in such a manner that siltation or sediment is carried off-site onto neighboring properties.
8. During his July 28, 2006 inspection, Mr. Zaykoski observed further that stormwater had eroded sediment from the stockpiled material across the southern property line and onto the neighboring property.

Discussion

Department staff served its December 18, 2006 motion for an order without hearing and supporting papers in lieu of a notice of hearing and complaint upon Leitz Enterprises, and Leitz Enterprises has failed to file a timely answer (see 6 NYCRR 622.12[a]). Department staff has requested a ruling on the merits of its motion, and argues that it is entitled to judgment as a matter of law.

Standards for a motion for order without hearing

A motion for order without hearing pursuant to 6 NYCRR 622.12 is governed by the same principles as a motion for summary judgment pursuant to New York Civil Practice Law and Rules (CPLR) § 3212. Section 622.12(d) provides that 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."

Section 622.12(d) also provides that the motion will be granted "in part if it is found that some but not all such causes of action or any defense should be granted, in whole or in part."

On a motion for summary judgment pursuant to the CPLR,

"movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. . . . The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [citations omitted] [quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]).

Therefore, Department staff bears the initial burden of making a prima facie showing of entitlement to summary judgment as a matter of law with respect to each element of the violations alleged (*see Cheeseman v Inserra Supermarkets, Inc.*, 174 AD2d 956, 957-958 [3d Dept 1991]). Once Department staff has done so, "it is imperative that a [party] opposing . . . a motion for summary judgment assemble, lay bare, and reveal his proofs" in admissible form (*id.*). Facts appearing in the movant's papers that the opposing party fails to controvert may be deemed to be admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]).

Before the Commissioner can determine whether to grant Department staff's motion for order without hearing, it is necessary to determine whether Staff has carried its initial burden of establishing a prima facie case on the factual allegations underlying each of the claimed violations. For the reasons discussed below, Staff has failed to make a prima facie showing. Accordingly, I deny Department staff's motion without prejudice. A hearing will be necessary to determine who is liable for the violations alleged in Staff's motion.

Service of Staff's Motion

Department staff may commence an enforcement action by serving a motion for order without hearing in lieu of a notice of hearing and complaint (see 6 NYCRR 622.12[a]). As noted above, service of Staff's motion for order may be either by personal service consistent with the CPLR, or by certified mail. Where service is by certified mail, service will be complete when the motion is received. (See 6 NYCRR 622.3[a][3] and 622.3[b].)

In her January 9, 2007 affidavit of service, Beth Anne Widrick explains how, on December 18, 2006, she mailed a copy of Department staff's December 18, 2006 motion papers to John J. Leitz, as the Secretary/Treasure for Leitz Enterprises, by certified mail, return receipt requested. Ms. Widrick states further that the US Postal Service returned the signed domestic return receipt to the Department's Region 6 Office on January 5, 2007. A copy of the signed receipt is attached to Ms. Widrick's January 9, 2007 affidavit of service. The signed receipt demonstrates that Leitz Enterprises received a copy of Staff's December 18, 2006 notice of motion and supporting papers on December 19, 2006.

Therefore, consistent with Civil Practice Law and Rules (CPLR) § 311(a)(1) and 6 NYCRR 622.3(a)(3), Ms. Widrick's January 9, 2007 affidavit of service demonstrates that Department staff obtained jurisdiction over Leitz Enterprises by serving John Leitz, in his capacity as corporate officer, with a copy of the December 18, 2006 motion for order without hearing. I cannot conclude as a matter of law, however, that Department staff obtained personal jurisdiction over John Leitz.

The Respondent, the Corporation, and the Permittee

Department staff's papers name Leitz Enterprises, Inc., and only Leitz Enterprises, as the respondent in this matter. Attachment I to Mr. King's supporting memorandum is a copy of the "Entity Information" from the New York State Department of State (DOS), Division of Corporations web site. Attachment I shows that Leitz Enterprises, Inc. is an active domestic business corporation. According to the DOS web site, the chairperson or chief executive officer for Leitz Enterprises is Barbara H. Leitz, and the corporate address is 162 McIntyre Road, Frankfort, New York 13340.

Attachment J to Mr. King's supporting memorandum is a copy of an organizational report required by the Department's Division of Mineral Resources. The information provided in the organizational report is consistent with the information provided on the DOS web site. In Attachment J, Mr. Leitz is identified as the Secretary/Treasurer for Leitz Enterprises.

Attachment K to Mr. King's supporting memorandum is a copy of the application for the renewal mining permit dated October 21, 2003. The name of the applicant (line 3) is Leitz Enterprises, Inc. The contact person listed on the application (line 5) is John Jay Leitz. Mr. Leitz is identified as the surface landowner (line 19), and signed the application as the owner of the mineral rights on the property (line 21). In addition, Mr. Leitz signed the application in his corporate capacity as the authorized representative for Leitz Enterprises (line 22).

Attachment A to Mr. Zaykoski's affidavit is a copy of a mined land reclamation renewal permit (DEC Permit No. 6-2126-00014/00001; Facility No. MLR# 601-3-30-0497), which the Department issued on October 28, 2003. The permit is effective from September 1, 2003 until August 31, 2008. In his affidavit (Paragraph 5), Mr. Zaykoski refers to Attachment A, and states that the Department issued the permit to Leitz Enterprises, Inc. A careful review of Attachment A shows, however, that the Department issued the permit to John Leitz, and not to Leitz Enterprises. The terms and conditions of the permit require the permittee, who is John Leitz rather than Leitz Enterprises, to comply with the applicable regulatory requirements and the approved mined land reclamation plan.

Staff's proof shows that despite the corporation's efforts to obtain a renewal permit, Department staff issued the renewal permit to an individual. This individual, although an officer of the corporate respondent, is not a named respondent in this enforcement action. As a result, the corporate respondent identified in this enforcement action is not the permittee who allegedly violated the mined land reclamation renewal permit. I conclude, therefore, that Staff failed to make the required prima facie showing which would entitle it to summary judgment as a matter of law. Accordingly, I deny the motion without prejudice.

A hearing will be necessary to determine whether Department staff issued a permit to Leitz Enterprises, and whether Leitz Enterprises failed to comply with its terms and conditions. Alternatively, Staff could show that the corporate respondent,

Leitz Enterprises, operates the mine on behalf of the permittee, John Lietz. Finally, Department staff may amend its motion to include John Leitz as a respondent, and serve Mr. Leitz with the amended motion in a manner consistent with 6 NYCRR 622.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge
Office of Hearings and Mediation Services
NYS Department of Environmental Conservation
625 Broadway, First Floor
Albany, New York 12233-1550

Dated: Albany, New York
June 20, 2007

To: John J. Leitz, Sr. by certified mail
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