NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of the New York State Environmental Conservation Law (ECL) Articles 17, 19, 27 and 72 and Parts 201, 228, 364, and 371 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by;

RULING

DEC Case No. R1-20130725-87

MAN PRODUCTS, INC. and MICHAEL MANCUSI,

Respondents.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Susan H. Schindler, Assistant Regional Attorney of counsel), for staff of the Department of Environmental Conservation.
- Michael Mancusi, *pro se* and for Man Products, Inc.

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (Department or DEC) staff moves for a default judgment against respondents Michael Mancusi and Man Products, Inc. (Man Products) pursuant to 6 NYCRR 622.15.[1] In support of its motion, Department staff submitted an attorney affirmation of Susan Schindler dated December 22, 2016 with Exhibits 1-21 attached, proof of service of the notice of motion and motion upon respondents and a proposed order. Staff filed the motion based upon respondents' failure to file an answer to an administrative complaint more than two months after the answer was due.

Respondent Michael Mancusi filed an affidavit in support of an order to show cause to re-open the default opposing the motion. I will treat Mr. Mancusi's affidavit as a motion to reopen the default. For the reasons that follow, Department staff's motion is denied without prejudice. Mr. Mancusi's motion to reopen the default is granted; and respondents are directed to file an answer and provide supporting documentation as set forth in this ruling.

[1] The caption of the notice of motion and motion for default judgment and the notice of hearing and complaint alleges a violation of ECL article 71. Staff does not allege a violation of ECl article 71 but does allege a violation of ECL article 72. The caption here reflects the alleged violation of ECL article 72.

Proceedings

Department staff commenced this proceeding by service of a notice of hearing and complaint dated September 14, 2015 (complaint). In the complaint, staff alleges that respondents' operation of a surface coating facility located in the Town of Amityville, New York (Suffolk County), violated ECL Articles 17, 19, 27 and 71 and associated implementing regulations at 6 NYCRR parts 201, 228, 364, and 371. The complaint charges that respondents operated an air contamination source without a registration as required by 6 NYCRR part 201 and violated various provisions of former 6 NYCRR part 228, including using paint that exceeded the permissible limit of volatile organic compounds (former 6 NYCRR 228-1.3), failing to maintain records (former 6 NYCRR 228-1.5[a]), failing to demonstrate the efficiency of an air cleaning device (former 6 NYCRR 228-1.3[c]), and improperly storing materials (former 6 NYCRR 228-1.10[a] and 228-1.10[e]). The complaint also charges that respondents failed to make a hazardous waste determination as required by 6 NYCRR 371.1(f) and 373.2(a)(2), failed to use a permitted waste transporter for regulated waste in violation of 6 NYCRR 364.2(b), discharged waste into waters of the State in violation of ECL 17-0511, and failed to pay air program fees in violation of ECL 72-0302.

Pursuant to 6 NYCRR 622.3(a)(3), Department staff served respondents Michael Mancusi and Man Products, Inc. with a notice of hearing and complaint by certified mail, return receipt requested on September 14, 2016. The United States Postal Service reported that the mailing was received by respondents on September 15, 2016, as indicated by Department staff's receipt of two signed green cards from respondents, thereby completing service pursuant to section 622.3(a)(3). Respondents had 20 days to serve an answer (6 NYCRR 622.4[a]).

More than two months after Department staff failed to receive a timely answer from respondents, staff filed a notice of motion and motion for a default judgment pursuant to 6 NYCRR 622.15 with the Department's Office of Hearings and Mediation Services (OHMS). The motion was received in OHMS on December 28, 2016.

On or about January 12, 2017, James D'Angelo, Esq., counsel for respondents, and Susan H. Schindler, Esq., Assistant Regional Attorney, advised OHMS that Department staff consented to extend the time for respondents to file and serve a response to the motion for default judgment until February 15, 2017 so that respondents could retain environmental counsel.

On February 15, 2017, Michael Mancusi, on behalf of respondents, filed a one page motion to reopen the default in response to staff's motion. Department staff received Mr. Mancusi's affidavit seeking to reopen the default from OHMS via email on February 15, 2017 and were subsequently served with the motion by certified mail. On February 22, 2017, Ms.

Schindler filed an attorney affirmation on behalf of Department staff opposing respondents' motion to reopen the default. The following day Mr. Mancusi attempted to submit a sur-reply to Department staff's response. The sur-reply was not authorized by me and is not authorized under the Department's regulations. Therefore, I will not consider it.

Discussion

Legal Framework

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (*see* 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). If a respondent fails to answer a complaint, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (*see* 6 NYCRR 622.15[b][1]-[3]). The record in this matter establishes that Department staff satisfied the procedural prerequisites of 6 NYCRR 622.15 with respect to its motion for a default judgment.

Pursuant to 6 NYCRR 622.15(d), a default in answering may be reopened upon a showing that a meritorious defense is likely to exist and that good cause for the default exists. Guided by standards applicable to default judgment motions under CPLR 3215 (*see Matter of Makhan Singh*, Decision and Order of the Commissioner, March 19, 2004, at 2), whether good cause — or reasonable excuse under the CPLR — for the default exists depends upon the extent of the delay, whether the opposing party has been prejudiced, whether the defaulting party has been willful, and the "strong public policy" in favor of resolving cases on the merits (*Puchner v Nastke*, 91 AD3d 1261, 1262 [3d Dept 2012]; *see also Huckle v CDH Corp*., 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion]).

Respondents' Position

Mr. Mancusi attests in his affidavit that respondents have a meritorious defense to staff's charges and a reasonable excuse for their default in answering the complaint within 20 days. As to their reasonable excuse, Mr. Mancusi states, "our Lawyer at the time failed to notify us, or reply to the Court. Man Products did not respond as we were being represented by Counsel, at that time" (motion to reopen default).

As to respondents' meritorious defense, Michael Mancusi averred that Man Products has a meritorious defense "to all capricious and arbitrary claims, allegations and accusations made by the Department of Environmental Conservation," that the Department has failed to provide any

scientific evidence to prove its allegations against Man Products, and that Man Products has "scientific lab reports that contradict any and all" of Department staff's allegations (motion to reopen default). Mr. Mancusi asks that respondents be granted an opportunity to present their defense.

Department Staff's Position

Ms. Schindler asserts in response to respondents' motion to reopen the default that Michael Mancusi's affidavit is procedurally and substantively deficient because respondents failed to respond to the causes of action and allegations set forth in the complaint and in Department staff's motion for default judgment. Ms. Schindler further contends that respondent failed to raise a meritorious defense, failed to provide the scientific lab reports to support their claimed defense, and failed to address their failure to answer or otherwise respond to the complaint in a timely manner.

Analysis

Michael Mancusi is the president of Man Products. He is appearing in this proceeding *pro se* and is also representing Man Products. Mr. Mancusi essentially claims that law office failure prevented respondents from filing a timely answer to the complaint and that respondents possess scientific data that will exonerate them. Mr. Mancusi's affidavit is sufficient to show a reasonable excuse for respondents' delay in answering the complaint and demonstrate the existence of questions of fact that implicate potentially meritorious defenses to the charges in the complaint. Inasmuch as Department staff filed its complaint less than six months ago, public policy favors a decision on the merits, and Mr. Mancusi claims to possess relevant scientific evidence, I will allow respondents the opportunity to file an answer in this proceeding. Consequently, I deny Department staff's motion for a default judgment without prejudice to renew if respondents fail to answer the complaint as directed in this ruling.

Staff's contention that respondents failed to answer the complaint or provide the scientific lab reports referenced in Mr. Mancusi's affidavit is duly noted. Respondents are obligated under the regulations to file an answer to the complaint and I direct respondents do so on or before **March 20, 2017** (*see* 6 NYCRR 622.15.4[a]). Inasmuch as Mr. Mancusi attested in his affidavit that Man Products has scientific lab reports to rebut all of Department staff's allegations, and in the interest of promoting an efficient administrative process, I direct that such lab reports be attached to, and filed with, respondents' answer. **Respondents' failure to file an answer on or before March 20, 2017 will constitute grounds for a default under 6 NYCRR 622.15 and a waiver of respondents' right to a hearing.** Respondents must follow the Department's rules applicable to service of papers pursuant to 6 NYCRR 622.6(a) and serve counsel for Department staff with the answer at the same time it is filed with the Office of

Hearings and Mediation Services. Respondents may file their answer with me and Ms. Schindler by electronic mail provided that a conforming hardcopy is mailed by first class mail and postmarked by the deadline date (*see* Civil Practice Law and Rules § 2103 providing that service of papers is complete upon mailing by first class mail).

Respondents should consult the Department's regulations at 6 NYCRR 622.4 which sets forth the rules for answering a complaint. In particular, the answer must be signed by both respondents, or by their attorney or other authorized representative who has filed a notice of appearance with me in this proceeding (6 NYCRR 622.4[a]). As staff notes, if Mr. Mancusi is answering on behalf of Man Products, he must sign the answer individually for himself as well as in a representative capacity for Man Products. Respondents must specify in their answer which allegations they admit, which allegations they deny and which allegations they have insufficient information upon which to form an opinion regarding the allegation (6 NYCRR 622.4[b]).

Respondents must also raise any affirmative defenses, including any exemptions to permit requirements, in their answer (6 NYCRR 622.4[c]). Any affirmative defenses raised in their answer must be supported by a statement of facts which constitutes the grounds for each affirmative defense asserted (*id.*). Affirmative defenses not raised in their answer may be waived (*id.*).

Respondents should also review the Department's uniform enforcement hearing procedures in 6 NYCRR part 622 as they will govern the conduct of this enforcement proceeding. These regulations are available on the Department's web site at: https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Ifc4b48d0b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default). In addition, respondents should review the Department's guide to enforcement hearings at http://www.dec.ny.gov/regulations/2440.html.

Finally, I am providing the parties with a copy of 6 NYCRR part 228 that was in effect on May 2, 2013, the date the violations alleged in staff's complaint occurred with respect to part 228, since part 228 was repealed and replaced on June 5, 2013.

Ruling

Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is denied without prejudice to renew such motion or file a new motion if respondents fail to answer the complaint within 20 days of the date of this ruling.

Respondents' motion to reopen the default is granted pursuant to 6 NYCRR 622.15(d).

Respondents shall serve an answer to Department staff's complaint by **March 20, 2017**. Such answer shall include the scientific lab reports that are referenced in Mr. Mancusi's affidavit.

_____/s/_____
Lisa A. Wilkinson
Administrative Law Judge

Dated: February 28, 2017
Albany, New York

Attachment