

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations  
of Article 25 of the New York State  
Environmental Conservation Law;  
Part 661 of Title 6 of the Official  
Compilation of Codes, Rules and  
Regulations of the State of New York;  
and NYSDEC Permit No. 1-4738-03014/00001,

**RULINGS**

**DEC No.**

**R1-20070815-215**

**R1-20070815-216**

- by -

**RICHARD and ELISE MARTINO,  
CHARLEY CARUSO and LA BELLA ROMA  
HOME IMPROVEMENT CORP.,**

Respondents.

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Appearances:

- - Alison H. Crocker, Deputy Commissioner and General  
Counsel (Gail Rowan, of counsel), for the Department of  
Environmental Conservation (DEC or Department) staff

- - Wickham, Bressler, Gordon & Geasa, P.C. (Eric J.  
Bressler, Esq., of counsel), for respondents

PROCEEDINGS

Department staff commenced two separate enforcement  
proceedings against respondents Richard and Elise Martino and  
Charley Caruso and La Bella Roma by service of notices of hearing  
and complaints, both dated February 22, 2008. The staff allege  
in the complaints that the respondents Martino own property at  
3875 Hallock Lane Ext., Mattituck, Town of Southold, Suffolk  
County, New York, upon which the staff discovered in November  
2006 that there were violations of the tidal wetlands permit that  
had been issued to the respondents. These allegations are based  
upon construction activities performed by the respondents Caruso  
and La Bella Roma in violation of Article 25 of the Environmental  
Conservation Law (ECL) and Part 661 of Title 6 of the Official  
Compilation of Codes, Rules and Regulations of the State of New  
York (NYCRR).

Respondents Martino filed an answer dated March 17, 2008 in which they generally deny the allegations, deny sufficient knowledge or information upon which to respond to the allegations, and set forth five affirmative defenses. Respondents Caruso and La Bella Roma filed an answer dated April 14, 2008 in which they generally deny the allegations, deny sufficient knowledge or information upon which to respond to the allegations, and set forth four affirmative defenses.

Administrative Law Judge (ALJ) Richard R. Wissler conducted conference calls with the parties concerning pleading and discovery dates. All respondents agreed to reconvene the conference call on April 25, 2008.

Due to scheduling conflicts, these two enforcement matters were reassigned. The Martino matter was assigned to ALJ Helene Goldberger and the Caruso/La Bella matter was assigned to ALJ Richard Sherman. At the time of this assignment, neither of these ALJs were aware that the matters were related.

Pursuant to 6 NYCRR § 622.4(f), by notices of motion and affirmations dated April 17 and 23, 2008, respectively, Department staff moved for orders to direct clarification of the respondents' second and first affirmative defenses. By a letter dated April 22, 2008 and received by the DEC's Office of Hearings and Mediation Services (OHMS) on April 23, 2008 and during the conference call on April 25, 2008, Mr. Bressler opposed Ms. Rowan's motions. By electronic mail of April 24, 2008, Ms. Rowan also requested permission to serve interrogatories on all the respondents stating that the use of this discovery device would expedite the proceedings.

On April 25, 2008, ALJ Goldberger and ALJ Sherman convened the conference call with Mr. Bressler and Ms. Rowan. During this call, the ALJs learned that the two enforcement proceedings were based upon the exact same set of facts. Mr. Bressler is counsel to all the respondents. He explained that his clients knowingly signed a waiver of conflicts. Mr. Bressler requested that these matters be consolidated in order to avoid inconsistent rulings. Ms. Rowan objected to consolidation stating that staff wanted the cases to be heard independently. The ALJs agreed to discuss this matter after the phone call and to issue a ruling shortly.

With respect to the staff's motion for clarification with respect to the respondents' affirmative defense of estoppel, ALJ Goldberger referred to her ruling in Matter of Katzav Realty, LLC (2/27/08).

During this conference call, Mr. Bressler also requested the opportunity to serve interrogatories although he had sent a facsimile dated April 24, 2008 objecting to the staff's request to serve interrogatories. ALJ Goldberger allowed for the respondents' oral request.

As a result of the discussions during this call, the parties agreed that they would serve proposed interrogatories by May 8, 2008 and serve any objections with explanations by no later than May 15, 2008. The parties agreed that as of now the dates of June 24-25, 2008 for adjudication of the Martino matter is retained.

ALJ Goldberger advised that she would reduce all rulings and agreements made during this call to a ruling on April 28, 2008.

#### DISCUSSION

##### Motion for Clarification of Affirmative Defenses

An affirmative defense is a matter that is the respondent's burden to plead and prove and includes such defenses as collateral estoppel, statute of limitations, and release. See, Civil Practice Law & Rules (CPLR) 3018(b). As explained by Professor Siegel, an affirmative defense raises a matter that is not plain from the face of the complaint. See, New York Practice, 3rd ed., Siegel (1999) at 351. CPLR 3211(b) allows a party to move to dismiss a defense if it "is not stated or has no merit." Section 622.4(c) of 6 NYCRR reiterates the CPLR's requirements in stating that "[t]he respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted."

In Martinos' second affirmative defense and Caruso/La Bellas' first affirmative defense, the respondents state, that the "activities which may have been conducted on the Site and which may constitute violations were conducted with the knowledge and consent of the Department of Environmental Conservation and the Department of Environmental Conservation is estopped thereof from maintaining this proceeding." As noted by staff, there are no factual grounds provided in the complaint to support these defenses.

Moreover, estoppel is not generally available against the State. Wedinger v. Goldberger, 129 AD2d 712 (2d Dep't 1987), *aff'd*, 71 NY2d 428 (1988). Only when a party can demonstrate that a government agency negligently or wrongfully induced reliance by a party so that it changed its position to its detriment may estoppel be invoked. Bender v. New York City

Health & Hospital Corp., 38 NY2d 662 (1976).

We reject Mr. Bressler's arguments claiming that staff's motion was unclear as to which affirmative defense(s) were being challenged. It is apparent that staff has identified the affirmative defense set forth in paragraph 20 of both Verified Answers that raise estoppel. As for respondents' argument that the affirmative defense of estoppel is made clear and that knowledge is within the Department, while the legal claim is stated expressly, there are no facts set forth to support it.

Ruling: This affirmative defense does not meet the requirements of 6 NYCRR § 622.4(c). Accordingly, we grant staff's motion for clarification and respondents must serve an amended verified answer.

#### Motion to Consolidate Proceedings

Section 622.10(e)(1) of 6 NYCRR provides that "[i]n proceedings which involve common questions of fact, the Chief ALJ upon the ALJ's own initiative or upon motion of any party, may order a consolidation of proceedings or a joint hearing of any or all issues." As in the Matter of ExxonMobil Corporation, et al. (ALJ Ruling, 9/23/02), because there are common factual and legal grounds upon which these matters are based, the respondents are represented by the same counsel, and the Department staff is also represented by the same counsel, in the interests of administrative efficiency and economy, and to avoid conflicts in outcomes, we are recommending that the Chief ALJ order consolidation of these two matters. Given the early stage of these proceedings, we can discern no prejudice to any party resulting from consolidation.

Ruling: Our recommendation to consolidate the matters of Martino and Caruso/Bella Roma matters has been accepted by Chief ALJ James T. McClymonds. ALJ Sherman will be presiding over this matter and there will be one caption as is set forth in these rulings. The dates reserved for hearing the Martino matter - June 24-25, 2008 - will be kept to hear this consolidated matter.

#### Requests to File Interrogatories

Section 622.7(2) of 6 NYCRR permits the use of written interrogatories with the permission of the ALJ "upon a finding that they are likely to expedite the hearing." As noted by Mr. Bressler, Ms. Rowan's request simply concludes that the staff's interrogatories would result in such expedition without any demonstration of same. Because both parties are seeking to use

this device, we agreed that they will serve proposed interrogatories on each other and provide copies to this office by May 8, 2008. By May 15, 2008, the parties will serve any objections to the proposed interrogatories with copies to the OHMS.

Ms. Rowan also noted that the use of this discovery device may prompt settlement of some or all of the issues. Whereupon, ALJ Goldberger offered the services of the DEC OHMS to facilitate through mediation a resolution.

Ruling: The parties agreed to the exchange of proposed interrogatories by May 8, 2008 and the filing of objections by May 15, 2008.

#### Amended Answer

The respondents will have to file an amended answer to clarify their affirmative defense of estoppel; however, we neglected to set a date for this filing. Accordingly, we are directing that the respondents file an amended answer by no later than May 8, 2008.

Ruling: By no later than May 8, 2008, the respondents will file a consolidated amended answer that clarifies their affirmative defense of estoppel.

#### CONCLUSION

We grant staff's motion for clarification of Martinos' second affirmative defense and Caruso/La Bella's first affirmative defense and direct the respondents to file a consolidated amended answer by no later than May 8, 2008. The parties will exchange proposed interrogatories by May 8, 2008 and file objections to same by May 15, 2008.

Any future filing and inquiries in this matter should be directed to ALJ Richard Sherman of this office. In the event that the parties wish to attempt to resolve this enforcement proceeding through mediation, they will let ALJ Sherman know and the OHMS will assign an ALJ to facilitate that process. Unless

the matter is resolved, the dates of June 24-25, 2008 are retained for a hearing in this consolidated enforcement matter.

Dated: Albany, New York  
April 28, 2008

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

\_\_\_\_\_/s/\_\_\_\_\_  
Richard Sherman  
Administrative Law Judge

\_\_\_\_\_/s/\_\_\_\_\_  
James T. McClymonds  
Chief Administrative Law Judge

TO: Gail Rowan, Assistant Regional Attorney  
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