

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

In the Matter of Alleged Violations of
Article 19 of the New York State
Environmental Conservation Law ("ECL")
and Part 232 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("NYCRR"),

ORDER

DEC Case No.
D1-2069-04-02¹

- by -

MIKE'S DRY CLEANERS, INC.,

Respondent.

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Mike's Dry Cleaners, Inc. by service of a notice of hearing and complaint, both dated May 20, 2005.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), the notice of hearing and complaint was hand delivered to the New York State Department of State on May 20, 2005, pursuant to Business Corporation Law § 306(b). Thereafter, also on May 20, 2005, an additional copy of the notice of hearing and complaint was sent by first class mail to respondent's last known address at 392 Central Avenue, Lawrence, New York.

The complaint alleged violations of the Environmental Conservation Law ("ECL") and 6 NYCRR part 232 arising out of respondent's ownership or operation of a perchloroethylene ("perc") dry cleaning facility as described in 6 NYCRR 232.1(a) and an air contamination source as defined by ECL 19-0107(5) and 6 NYCRR 200.1(f). According to the complaint, on September 12, 2003, a third-party inspector performed an inspection of respondent's dry cleaning facility on behalf of Department staff and identified certain deficiencies and violations documented in

¹ By memorandum dated March 14, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

a Part 232 Dry Cleaning Compliance Inspection Report. As a result of these deficiencies and violations, Department staff's complaint alleged that respondent:

1. Operated the subject perc dry cleaning facility without a current and valid owner/manager certification, in violation of 6 NYCRR 232.14(a)(1);
2. Operated the dry cleaning machinery at the subject perc dry cleaning facility without a current and valid dry cleaning operator certification, in violation of 6 NYCRR 232.14(a)(2);
3. Failed to have the subject perc dry cleaning facility inspected during the year 2000, in violation of 6 NYCRR 232.16;
4. Failed to have the subject perc dry cleaning facility inspected during the year 2001, in violation of 6 NYCRR 232.16;
5. Failed to have the subject perc dry cleaning facility inspected during the year 2002, in violation of 6 NYCRR 232.16; and
6. Failed to display the Department of Environmental Conservation posting notice in a conspicuous location at the subject perc dry cleaning facility, in violation of 6 NYCRR 232.18.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on June 14, 2005, and was not extended by Department staff. Respondent failed to file a timely answer or otherwise appear. Respondent also failed to appear at the pre-hearing conference held on June 28, 2005 at the Department's Region 1 headquarters in Stony Brook, New York. Accordingly, respondent is in default and has waived the right to a hearing.

Department staff filed a motion for default judgment, dated February 6, 2007, with the Department's Office of Hearings and Mediation Services. Department staff also served the motion on respondent by mail. The matter was assigned to Administrative Law Judge ("ALJ") Mark D. Sanza, who prepared the attached default summary report. I adopt ALJ Sanza's report as my decision in this matter, subject to the following comments.

Based upon the record, I conclude that the proposed

civil penalty and remedial measures sought by Department staff to address the violations are authorized and appropriate. I also conclude that the remedial measures are authorized and warranted, and the dates recommended by staff by which respondent is to achieve compliance with applicable regulatory standards are authorized and reasonable.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment against respondent Mike's Dry Cleaners, Inc. is granted.

II. Respondent is adjudged to be in default and to have waived the right to a hearing in this administrative enforcement proceeding. Accordingly, the factual allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.14(a)(1) on September 12, 2003 by operating the subject perc dry cleaning facility without a current and valid owner/manager certification.

IV. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.14(a)(2) on September 12, 2003 by operating the dry cleaning machinery at the subject perc dry cleaning facility without a current and valid dry cleaning operator certification.

V. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2000.

VI. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2001.

VII. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2002.

VIII. Respondent is adjudged to have violated the provisions of ECL article 19 and 6 NYCRR 232.18 by failing to display the

Department of Environmental Conservation posting notice in a conspicuous location at the subject perc dry cleaning facility.

IX. Respondent Mike's Dry Cleaners, Inc. is hereby assessed a civil penalty in the amount of seventeen thousand five hundred dollars (\$17,500). The civil penalty shall be due and payable within thirty (30) days after the service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Michael J. Derevlany, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

X. Respondent is hereby directed:

- A. Within fifteen (15) days after service of this order, to display a Department of Environmental Conservation posting notice in a conspicuous location at the subject perc dry cleaning facility, and to have the subject perc dry cleaning facility inspected by a registered compliance inspector. The dry cleaning machinery at the subject facility cannot be operated until the inspection required by this paragraph has taken place. If respondent fails to have the subject perc dry cleaning facility inspected by the time period set forth herein, such failure shall be deemed grounds to seal all air contamination sources at the subject dry cleaning facility pursuant to 6 NYCRR 200.5; and
- B. Within one hundred twenty (120) days after service of this order, to obtain a State certification as an owner/manager and operator of a perchloroethylene dry cleaning facility, or hire a State certified facility manager and certified operator to operate the subject dry cleaning facility until such time as respondent achieves certification. If respondent fails to take the corrective action within this time period, the dry cleaning machinery at the subject facility cannot be operated and such failure shall be deemed grounds to seal all air contamination sources at

the subject dry cleaning facility pursuant to 6
NYCRR 200.5.

XI. All communications from respondent to the Department concerning this order shall be made to: Michael J. Derevlany, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.

XII. The provisions, terms and conditions of this order shall bind respondent Mike's Dry Cleaners, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Louis A. Alexander
Assistant Commissioner

Dated: March 16, 2007
Albany, New York

TO: Mike's Dry Cleaners, Inc. (By certified mail)
392 Central Avenue
Lawrence, New York 11559
ATTN: Mike DeCicco

Michael J. Derevlany, Esq. (By regular mail)
New York State Department of
Environmental Conservation
Division of Environmental Enforcement
625 Broadway, 14th Floor
Albany, New York 12233-5500

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

In the Matter of Alleged Violations of
Article 19 of the New York State
Environmental Conservation Law ("ECL")
and Part 232 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR"),

**DEFAULT
SUMMARY REPORT**

DEC Case No.
D1-2069-04-02

- by -

MIKE'S DRY CLEANERS, INC.,

Respondent.

Proceedings

On May 20, 2005, staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Mike's Dry Cleaners, Inc. by hand delivering an original and one copy of a notice of hearing and complaint, both dated May 20, 2005, upon the New York State Department of State, pursuant to Business Corporation Law ("BCL") § 306(b). Thereafter, on the same date, Department staff served an additional copy of the May 20, 2005 notice of hearing and complaint upon respondent by first class mail at respondent's last known address, pursuant to Civil Practice Law and Rules § 3215(g)(4).

According to the complaint, respondent Mike's Dry Cleaners, Inc. owns or operates a dry cleaning facility known as Mike's Dry Cleaners located at 392 Central Avenue, Lawrence (Nassau County), New York. The complaint maintains that respondent's facility is a perchloroethylene ("perc") dry cleaning facility as described in section 232.1(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and an air contamination source as defined by Environmental Conservation Law ("ECL") § 19-0107(5) and 6 NYCRR 200.1(f).

The complaint alleges that, on September 12, 2003, a third-party inspector performed an inspection of respondent's perc dry cleaning facility on behalf of Department staff and identified certain deficiencies and violations documented in a Part 232 Dry Cleaning Compliance Inspection Report. As a result

of these deficiencies and violations, Department staff's complaint alleged that:

1. Respondent violated 6 NYCRR 232.14(a)(1) by operating the subject perc dry cleaning facility without a current and valid owner/manager certification;
2. Respondent violated 6 NYCRR 232.14(a)(2) by operating the dry cleaning machinery at the subject perc dry cleaning facility without a current and valid dry cleaning operator certification;
3. Respondent violated 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2000;
4. Respondent violated 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2001;
5. Respondent violated 6 NYCRR 232.16 by failing to have the subject perc dry cleaning facility inspected during the year 2002; and
6. Respondent violated 6 NYCRR 232.18 by failing to display the Department of Environmental Conservation posting notice in a conspicuous location at the subject perc dry cleaning facility.

The May 20, 2005 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Mike's Dry Cleaners, Inc. must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for June 28, 2005 at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive his right to a hearing.

With a cover letter dated February 6, 2007, Michael J. Derevlany, Esq., compliance counsel for the Division of Air Resources within the Department's Division of Environmental Enforcement, filed a notice of motion for default judgment and a motion for default judgment, both dated February 6, 2007, with supporting papers against respondent Mike's Dry Cleaners, Inc. The supporting papers consisted of an affirmation by Mr.

Derevlany dated February 6, 2007, which documents respondent's failure to file a timely answer and failure to appear, along with attached Exhibits marked A, B, C, and D.

Exhibit A contains a copy of the notice of hearing and complaint, both dated May 20, 2005, as well as a copy of the Part 232 Dry Cleaning Compliance Inspection Report from the inspection of respondent's dry cleaning facility on September 12, 2003, as well as a copy of a notice of violation dated January 12, 2004 stemming from the September 2003 inspection. Exhibit B is an affidavit of service and mailing for the notice of hearing and complaint upon respondent sworn to by Department staff attorney Alyce M. Gilbert, Esq. on June 7, 2005. Exhibit C is a technical affidavit of Department staff engineer Robert Waterfall sworn to on February 2, 2007. Exhibit D is a technical affidavit of Department staff scientist Thomas Gentile sworn to on February 6, 2007. The technical affidavits of Department staff describe the environmental harm and human health risks associated with perc releases and respondent's violations of the cited provisions of 6 NYCRR part 232. Pursuant to 6 NYCRR 622.15(b), Department staff also provided a copy of a proposed order with its default motion papers.

Department staff's cover letter accompanying the instant motion indicate that its motion papers were mailed to respondent at its last known address and to the Department's Chief Administrative Law Judge ("Chief ALJ"), who assigned the matter to me in a letter dated February 9, 2007. By letter dated March 12, 2007, Mr. Derevlany provided the March 12, 2007 affidavit of service of Department employee Monica Hauck-Wheaton demonstrating service of a copy of staff's February 6, 2007 default motion upon the Department of State and mailing of same to respondent at its last known address.

Pursuant to the Department's regulations, all parties have five days after a motion is served to file a response (see 6 NYCRR 622.6[c][3]). When the time for performance of some act is measured from the service of an interlocutory paper (such as a motion), and service is made by mail, CPLR 2101(b)(2) gives the party so served five additional days within which to act. Thus, respondent had until February 16, 2007 to file a response to Department staff's motion. Although the copy of the Chief ALJ's February 9, 2007 assignment letter to respondent was returned to the Office of Hearings on February 26, 2007 as undeliverable, the record indicates that staff properly mailed a copy of its motion

papers to respondent at its last known address.¹

The bases for staff's motion for default judgment, as set forth in Mr. Derevlany's affirmation, are respondent's failure to file a timely answer to the May 20, 2005 complaint, and respondent's failure to appear at the June 28, 2005 pre-hearing conference. Department staff's submissions which accompanied its default motion, indicate that a copy of the motion and supporting papers, as described above, was mailed to respondent Mike's Dry Cleaners, Inc. at 392 Central Avenue, Lawrence, New York on February 6, 2007.

Findings of Fact

1. On May 20, 2005, Department staff attorney Alyce M. Gilbert, Esq. served a notice of hearing and complaint, both dated May 20, 2005, in DEC Case No. D1-2069-04-02 upon respondent Mike's Dry Cleaners, Inc. by hand delivering one original and one copy of the notice of hearing and complaint to the New York State Department of State, pursuant to BCL § 306(b).
2. On May 20, 2005, Department staff attorney Alyce M. Gilbert, Esq. served an additional copy of the May 20, 2005 notice of hearing and complaint upon respondent, by first class mail at respondent's last known address, pursuant to CPLR 3215(g)(4).
3. The May 20, 2005 notice of hearing stated that, pursuant to 6 NYCRR 622.4, respondent Mike's Dry Cleaners, Inc. must serve an answer upon Department staff within twenty (20) days of receiving the notice of hearing and complaint. As provided for by 6 NYCRR 622.8, the notice of hearing also scheduled a pre-hearing conference for June 28, 2005 at the Department's Region 1 headquarters in Stony Brook, New York. The notice of hearing stated that if respondent failed either to file an answer or to attend the pre-hearing conference as scheduled, respondent would be in default and would waive its right to a hearing.

¹ A search of the New York State Department of State, Division of Corporations, website conducted on March 9, 2007 revealed that respondent Mike's Dry Cleaners, Inc. is currently registered as an "active" domestic business entity with a principal office located at 392 Central Avenue, Lawrence, New York 11559 (see http://dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_...)

4. With respect to the May 20, 2005 complaint, the time for respondent Mike's Dry Cleaners, Inc. to serve an answer expired on June 9, 2005. As of the date of Department staff's default motion, respondent had not filed an answer.
5. With respect to the June 28, 2005 pre-hearing conference, respondent Mike's Dry Cleaners, Inc. failed to appear at the time and place as set forth in the May 20, 2005 notice of hearing.

Discussion

Department staff may commence an administrative enforcement proceeding by service of a notice of hearing and complaint (see 6 NYCRR 622.3[a][1]). Service of the notice of hearing and complaint must be by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]).

Pursuant to the Department's uniform enforcement hearing regulations, a respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), staff's default motion must contain:

- a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- b. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
- c. A proposed order.

The June 7, 2005 affidavit of service and mailing of Department staff attorney Alyce M. Gilbert, Esq. demonstrates service of the May 20, 2005 notice of hearing and complaint upon respondent in a manner consistent with the requirements set forth in 6 NYCRR 622.3(a)(3), BCL § 306(b), and CPLR 3215(g)(4). (See Matter of Polanaya Corp., Order of the Acting Commissioner, April 12, 2005, at 1.) In addition, the February 6, 2007 affirmation of Department staff attorney Michael J. Derevlany, Esq. demonstrates that respondent did not timely file any answer to the May 20, 2005 complaint and did not appear at the pre-hearing conference held on June 28, 2005.

The Department's regulations governing motions for a default judgment do not prescribe the circumstances under which a defaulting respondent is entitled to notice of the application by staff for a default judgment (see 6 NYCRR 622.15). In the situation where, as here, a notice of hearing and complaint is served upon a respondent more than one year prior to staff's motion for default judgment, it has been held that the provisions of the CPLR applicable to motions for default judgments should be consulted for the governing procedures (see Matter of Makhan Singh, Decision and Order of the Commissioner, March 19, 2004 at 2).

Under CPLR 3215(g)(1), notice of an application for a default judgment is required only where the defending party has appeared or where more than one year has elapsed between the date of the default and the motion. (Matter of Makhan Singh, supra, at 2-3.) To date, according to Mr. Derevlany's affirmation submitted in support of staff's default motion, respondent has failed to appear in this action first commenced in May 2005. (See affirmation of Michael J. Derevlany dated February 6, 2007 - "Basis for Default Judgment.") Additionally, according to the March 12, 2007 affidavit of Monica Hauck-Whealton, Department staff mailed a copy of its motion papers in this proceeding to respondent at its last known address.

Pursuant to 6 NYCRR 622.6(a)(1) and CPLR 2103(c), motion papers in Department proceedings may be served by mail. In accordance with the provisions of CPLR 2103(b)(2) and (c), and CPLR 3215(f) and (g), service by mail is complete upon proper posting, without regard to receipt. (See Tappis v National Van Lines, Inc., 43 Misc2d 157 [App Term, 1964]; A. & B. Service Station, Inc. v State, 50 AD2d 973 [3d Dept], lv denied 39 NY2d 709 [1975].) Thus, staff properly served the notice of motion and motion for default in this case pursuant to CPLR 2103(c) and 3215(f) and, to date, there has been no appearance or reply to the motion on behalf of respondent.

Based on these circumstances, respondent Mike's Dry Cleaners, Inc. has defaulted and waived its right to a hearing, and Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15(a). By operation of the default, respondent is deemed to have admitted the factual allegations set forth in staff's complaint. Staff's motion papers also set forth factual allegations that demonstrate respondent's liability for each cause of action alleged by staff. Therefore, respondent's liability is established.

Department staff has provided a proposed order with its default motion papers. The proposed order would assess a total civil penalty of \$17,500, and would require respondent to comply with applicable requirements of ECL article 19 and 6 NYCRR part 232 within certain specified time periods.

When a respondent defaults, he waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, however, still has the obligation to prove damages. (See Matter of Alvin Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 3-4.)

Any person, which includes a corporation (see ECL 19-0107[1] and 6 NYCRR 200.1[bi]), who violates any provision of ECL article 19 or any code, rule or regulation which was promulgated thereto shall be liable, in the case of a first violation, for a penalty not less than three hundred seventy-five dollars nor more than fifteen thousand dollars for said violation and an additional penalty of not to exceed fifteen thousand dollars for said violation for each day during which such violation continues (see ECL 71-2103[1]). In this proceeding, Department staff are unaware of any specific prior 6 NYCRR part 232 violations at respondent's subject perc dry cleaning facility. (See affirmation of Michael J. Derevlany dated February 6, 2007 - "History of Noncompliance.")

Here, Department staff has proposed a total civil penalty that is substantially less than the potential maximum that could be assessed under the applicable provisions of law. This is significant given the inability of Department staff to monitor potential releases of perchloroethylene from the subject dry cleaning equipment resulting from the violations, as well as the continuing nature of such releases over the course of at least three years. In addition, the civil penalty requested by Department staff is appropriate and consistent with civil penalties assessed previously by the Commissioner in similar cases.

Finally Department staff's default motion includes a schedule to bring respondent's perc dry cleaning facility into compliance with the applicable regulations within certain time periods following the date of service of a copy of an order in this matter. I conclude that the dates in the compliance schedule outlined in staff's default motion are authorized and reasonable.

Conclusions

1. Respondent Mike's Dry Cleaners, Inc. has defaulted and, therefore, has waived the right to a hearing with respect to liability for the violations alleged in the complaint. By defaulting, respondent is deemed to have admitted the factual allegations set forth in the complaint.
2. Respondent's liability for the six causes of action alleged in the complaint has been established.
3. Department staff's proposed total civil penalty of \$17,500 is rational and supported by the record. The penalty is justified particularly because of the environmental and human health risks that are posed by the types of violations committed by respondent. Furthermore, although staff have not apportioned the proposed penalty among the enumerated violations, the total penalty is below the statutory maximum amount under ECL 71-2103(1) that could be assessed for any one of the Part 232 violations cited, individually. On that basis, and given the duration of the violations, there is ample statutory support for the penalty requested by Department staff.
4. Department staff has provided sufficient justification for the proposed compliance schedule.

Recommendation

The motion for default judgment should be granted, and an order issued as described above providing the relief requested by Department staff.

/s/

Mark D. Sanza
Administrative Law Judge

March 13, 2007
Albany, New York