

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of the  
New York State Environmental Conservation Law  
Article 17,

RULING OF THE  
ADMINISTRATIVE LAW JUDGE  
ON MOTION TO DISMISS

by

DEC File No. R3-20080919-61

**Mt. Airy Estates, Inc., and Mark Sarna,**

**Respondents.**

(Orange County)

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Background

On or about April 30, 2009, Department of Environmental Conservation (DEC or Department) staff issued a notice of hearing and complaint to the respondents named in this proceeding which include Mt. Airy Estates, Inc. (MAE), (a corporation performing subdivision construction in the Town of New Windsor, New York) and a corporate officer of MAE.<sup>1</sup> The staff alleges in its complaint that the respondents violated Article 17 of the Environmental Conservation Law (ECL) by discharging without a State Pollutant Discharge Elimination System (SPDES) permit into Brown's Pond, a part of the City of Newburgh's drinking supply system and by failing to comply with the applicable SPDES General Permit for Stormwater Discharges from Construction Activity (GP-0-08-001).

On or about May 26, 2009, the respondents served the Department staff with their answer and Sarna's motion to dismiss. On or about June 11, 2009, Department staff served its response to the motion to dismiss.<sup>2</sup>

In these proceedings, staff is represented by Lara Quintiliani, Assistant Regional Attorney and respondents MAE and Sarna are represented by J. Benjamin Gailey, Esq. of Jacobowitz and

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<sup>1</sup> The original caption on staff's complaint includes "alleged violations of . . . Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York." I modified the caption because there is no reference in the complaint to allegations that the respondents violated the regulations.

<sup>2</sup> Respondents' counsel consented to staff's request for an extension of time to submit its response to the motion to dismiss on June 12, 2009.

Gubits, LLP.

I have reviewed the following submissions to make these rulings:

1. Staff's notice of hearing and complaint dated April 29, 2009 annexed as Exhibit A to Gailey affirmation,
2. Respondent Sarna's notice of motion to dismiss proceeding dated May 26, 2009,
3. Affirmation of J. Benjamin Gailey, Esq. in support of motion to dismiss dated May 26, 2009,
4. Affidavit of Mark Sarna dated May 26, 2009,
5. Notice of Intent dated May 23, 2003 annexed to Gailey affirmation as Exhibit B,
6. Staff's notice of response to notice of motion to dismiss dated Jun 11, 2009,
7. Affirmation of Lara Quintiliani, Esq. dated June 11, 2009 with the following attachments:
  - A) Letters dated June 22, 2004, August 31, 2005, September 27, 2005, November 9, 2005, December 22, 2005, March 8, 2006, May 23, 2006, October 22, 2007, June 1, 2007, October 22, 2007, November 27, 2007, April 1, 2008, June 3, 2008, September 4, 2008, November 13, 2008, August 25, 2008 with attached inspection reports re: Erosion and Sediment Controls at Mount Airy Estates from Natalie Browne, DEC Environmental Program Specialist to Mark Sarna and
  - B) Order on Consent/Stipulation dated July 9, 2004 re: Mount Aire [sic] Estates with receipt for payment of \$5,000 penalty, letter dated July 22, 2004 from Vincent Altieri, Regional Attorney to Mark Sarna, MAE re: transmittal of executed consent order and acknowledgment of receipt of penalty with certified mail receipt.

### **Discussion**

Respondent Mark Sarna has moved to dismiss the complaint based upon staff's failure to state a claim against him. The complaint is sparse but the basic facts staff allege are that at least since 2004 the respondent MAE has been involved in constructing a subdivision at Mount Airy Road, in the Town of New Windsor, Orange County. Staff alleges that this subdivision known as Mt. Airy Estates, is governed by a SPDES General Permit for Stormwater Discharges from Construction Activity - GP-0-08-001. Staff alleges that discharges of stormwater from the development go into Brown's Pond, a part of the City of Newburgh's drinking water supply. Staff provides that on numerous occasions between 2004 and 2008, DEC staff inspected the site to find violations of the SPDES General Permit as well as violations of the ECL for discharging without a permit. Staff further states that the respondents were notified of these violations.

The respondent Mark Sarna contends that he is not an appropriate party to this proceeding because other than being an officer of the respondent corporation MAE, the complaint has not alleged "that Mr. Sarna committed any act, or failed to act, in any manner that violates any law or regulation." Citing Lawlor v. Hoffman, 59 AD3d 499, 500 (2d Dep't 2009), the respondent contends that in order to pierce the corporate veil, the plaintiff must show that the officer

committed some wrong against the plaintiff that resulted in the plaintiff's injury and that the "officer abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff."

In response to the respondent's motion to dismiss, Assistant Regional Attorney Quintiliani argues that Mr. Sarna, as an officer of the corporation, "has direct authority, responsibility and control over the management and construction at the site and as such is liable for the actions of the Corporation." Ms. Quintiliani cites to a number of cases and DEC decisions in support of the proposition that an individual corporate officer may be found personally liable: State v. Markowitz, 273 AD2d 637 (3d Dep't 2000); Matter of Mudd's Vineyard, Ltd., Commissioner's Decision and Order, August 8, 1994; Matter of Sheldon Galfunt and Hudson Chromium Company, Inc., Commissioner's Decision and Order, May 10, 1993; and Matter of 125 Broadway, LLC, Commissioner's Decision and Order, December 15, 2006. To support this proposition, Ms. Quintiliani provides in her affirmation that the Department's complaint sets forth that Mr. Sarna received the Department's many written notices of violations at MAE and that he was in a position to rectify these problems and failed to do so. In addition, she notes that Mr. Sarna signed the order on consent/stipulation in March 2004 that required MAE to comply with DEC directives regarding stormwater and erosion control measures. Ms. Quintiliani contends that Mr. Sarna was in a position to correct these ongoing violations and failed to do so.

In Markowitz, supra, the Third Department confirmed that it is appropriate to extend personal liability to stockholders and officers of a corporation where it can be shown that these individuals ". . . have been directly, actively and knowingly involved in the culpable activities or inaction which led to [the environmental violation at issue]" citing to Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421 (7<sup>th</sup> Cir. 1994); State of New York v. Shore Realty Corp., 759 F.2d 1032, 1054-1053 (2d Cir. 1985); Matter of Jackson's Marina v. Jorling, 193 AD2d 863 (3d Dep't 1993). Simply stated, in order to support individual liability of a corporate officer, the law requires a factual basis for imposing such liability. Matter of Salvatore Vitti, Commissioner's Order and Decision, March 7, 2008; Matter of 125 Broadway LLC, supra. An individual may be found to be derivatively liable if it can be shown that in his capacity as a corporate officer, he had the authority and responsibility to prevent the violations. United States v. Park, 95 S. Ct. 1903 (1975); United States v. Dotterweich, 64 S. Ct. 134 (1943); In the Matter of Sheldon Galfunt and Hudson Chromium Company, Inc., Commissioner's Decision, supra. This does not require piercing of the corporate veil. Matter of 125 Broadway, LLC, supra.

In this matter, as noted by the respondent Sarna, other than to identify him as an officer of the corporation, the complaint does not set forth even the barest information to link him to the alleged violations. In her responsive affirmation, Ms. Quintiliani supplements the information in the complaint with facts regarding the notices of violation and Mr. Sarna's involvement with the order on consent. But this does not change the status of the complaint. Based upon the lack of information in the complaint to support a basis for finding Mr. Sarna liable for the violations, I find it necessary to dismiss the complaint against respondent Sarna.



CONCLUSION

I grant the respondent's motion to dismiss. I direct the staff to amend the caption in this proceeding accordingly; the matter will continue against MAE, the corporate entity.

Dated: Albany, New York  
June 17, 2009

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Helene G. Goldberger  
Administrative Law Judge