

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 DISCONTINUE

by

DEC File No. R3-20080919-61

Mt. Airy Estates, Inc.,

Respondent.

(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 Mt. Airy Estates, Inc. (MAE), (a corporation constructing a subdivision in the Town of New Windsor, New York) and a corporate officer of MAE.¹ The staff alleges in its complaint that the respondent 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).

By notice of motion dated September 1, 2009, Assistant Regional Attorney Lara Quintiliani requests a ruling that the proceeding be discontinued without prejudice. Respondent's counsel, J. Benjamin Gailey, Esq., of Jacobowitz and Gubits, LLP, obtained staff's agreement to extend the respondent's time to respond to staff's motion until September 29, 2009 and Chief Administrative Law Judge James T. McClymonds approved this agreement. On October 1, 2009, this office received the respondent's affirmation opposing staff's request.

I have reviewed the following submissions to make this ruling:

1. Staff's notice of motion to discontinue the action dated September 1, 2009;
2. Staff's motion to discontinue the action dated September 1, 2009;

¹ My ruling of June 17, 2009 granted the respondent's motion to dismiss the staff's proceeding against Mark Sarna.

3. Ms. Quintiliani's affirmation in support of motion to dismiss dated September 1, 2009;
4. Affirmation of J. Benjamin Gailey, Esq. dated September 29, 2009 with Exhibit A: letter dated September 2, 2009 from Ms. Quintiliani to Mr. Gailey regarding Freedom of Information Law (FOIL) request; Exhibit B: notice of violation letter dated August 25, 2008 from DEC Environmental Program Specialist Natalie Browne regarding erosion and sediment controls at Mount Airy Estates.

Department staff's position

The Department staff provides that Part 622 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) do not specify the procedures for moving to discontinue a proceeding. Therefore, Ms. Quintiliani relies upon Civil Practice Law and Rules (CPLR) 3217(b) that provides for voluntary discontinuance by order of the court subsequent to the joinder of issue. Assistant Regional Attorney Quintiliani cites several cases to support discontinuance on a liberal basis barring any prejudice to the substantial rights of the defendant.

Respondent's position

Mr. Gailey opposes the staff's motion on the grounds that his client has been substantially prejudiced by the proceedings due to economic hardship and delay. He states that DEC counsel has stated staff's intention to re-file against MAE. The respondent maintains that there is little evidence to support the complaint and that efforts of MAE to glean such evidence have not been successful. Mr. Gailey points to respondent's efforts to persuade the staff to voluntarily remove Mr. Sarna without success until motion practice was pursued resulting in such dismissal at more cost to the respondent. Finally, the respondent argues that Department staff's delay enabled the City of Newburgh to pursue monetary penalties in its citizen suit against the respondent in a Clean Water Act action.

The respondent requests that staff's motion be denied but if granted that the administrative law judge direct the re-filing of a complaint within seven days; order DEC staff to serve respondent's attorneys with all documentary evidence of the violations alleged in the complaint and a summary of anticipated testimony; and order DEC to pay professional fees and other expenses incurred to date by respondent with respect to this proceeding.

Discussion

As noted by the parties, Part 622 of 6 NYCRR does not specify the procedures for discontinuance. Therefore, I agree with Department staff that it is appropriate to consult the procedures set forth in the CPLR. As noted by Ms. Quintiliani, the courts have determined that a plaintiff has the right to discontinue a pending action unless the defendant's substantial rights would be prejudiced. *See, e.g., Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 AD2d 857 (1st

Dep't 1964).

Mr. Gailey provides various arguments to support his conclusion that his client has been substantially prejudiced by these proceedings and they should be discontinued with prejudice. While he contends there is no basis for the proceedings, this discontinuance will give staff the opportunity to reframe its case, to negotiate a settlement, or to decide not to re-initiate the proceeding. By granting the discontinuance, there is no determination on the merits nor should there be at this stage.

While the respondent argues that it has been economically disadvantaged by having to litigate Mr. Sarna's position in the proceeding, to pursue information, and to face other charges in a federal case, I see nothing resulting from staff's motion that prejudices the respondent's rights. With respect to the FOIL request, the respondent has its right to appeal the staff's determination pursuant to Public Officers Law § 89(4)(a) and/or to pursue discovery pursuant to 6 NYCRR § 622.7 should the staff decide to re-file its complaint. With respect to the Clean Water Act litigation, I fail to see how the Department staff is responsible for timing its enforcement actions to either assist or undermine a citizen's suit under different laws in a different forum.

Staff represents that this proceeding is in the early stages prior to completion of discovery and settlement discussions are ongoing. Therefore, with due respect to the respondent's claims of lack of culpability, I cannot find that staff's request is unfair.

Based upon the liberal policy to grant motions to discontinue pursuant to the CPLR, I see no basis to deny staff's motion. I decline to adopt the respondent's strict time frame of seven days but encourage staff to act expeditiously should it wish to recommence the proceeding. As noted, the respondent has its right pursuant to 6 NYCRR § 622.7 to seek discovery, and there is no entitlement to attorney's fees or expenses in these proceedings.

CONCLUSION

I grant the staff's motion to discontinue this proceeding without prejudice.

Dated: Albany, New York
October 6, 2009

_____/s/_____
Helene G. Goldberger
Administrative Law Judge