

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 11
of the Environmental Conservation Law (ECL) of the
State of New York,

RULING

by

DEC File No.
R4-2019-1230-91

NICHOLAS PACINELLO,

Respondent.

Appearances of Counsel:

Thomas S. Berkman, Deputy Commissioner and General Counsel (Stephen Repsher, Esq. of counsel), for staff of the Department of Environmental Conservation

Michaelangelo Matera, Esq., for respondent Nicholas Pacinello

In this administrative proceeding to revoke the hunting license of respondent, New York State Department of Environmental Conservation (DEC or Department) staff alleges respondent Nicholas Pacinello violated 11-0107 and 11-0901 on or about November 25, 2018. Department staff served respondent with a Notice of Hearing and Complaint dated September 1, 2020 which alleged that by arranging for or authorizing the unlawful taking of deer by a youth hunter over a pre-established bait pile, respondent failed to properly mentor the youth hunter in violation of:

(1) ECL 11-0107(1) which provides, in relevant part, that no person shall “at any time of the year, pursue, take, wound or kill in any manner, number or quantity, any [game] except as permitted by the Fish and Wildlife Law;” and

(2) ECL 11-0901(4)(b)(7) which provides, in relevant part, that no person shall hunt deer with the aid of a pre-established bait pile.

The Department seeks an order: (1) revoking respondent’s hunting license pursuant to ECL 11-0719(3); (2) denying respondent the privilege of obtaining a hunting license for five (5) years from the date of the Commissioner’s order; and (3) imposing a civil penalty in the amount of three hundred (\$300) dollars pursuant to ECL 71-0925(1).

PROCEEDINGS

By notice of motion dated December 31, 2020 and served January 6, 2021, respondent moved for an order (1) dismissing the proceeding on the basis that there was an illegal entry upon the subject premises without an administrative search warrant, and excluding and suppressing the evidence obtained from the warrantless illegal entry and search and seizure of evidence. Department staff opposed the motion by affirmation of Stephen Repsher, Esq, assistant regional attorney, dated January 26, 2021 and affidavit of George Wilber (*Wilber*), investigator in the Department's Division of Law Enforcement, Bureau of Crimes Investigations (BECI) sworn to on January 26, 2021. Respondent served a reply affirmation of Michaelangelo Matera, Esq. dated February 1, 2021. By motion dated January 26, 2021, Department staff moved for leave to amend the complaint with the affirmation of Stephen Repsher, Esq. dated January 26, 2021 in support of the motion, and the proposed amended complaint. Respondent served the affirmation of Michaelangelo Matera, Esq. dated February 4, 2021 in opposition to the motion.

DISCUSSION

1. Respondents' motion to dismiss based on illegal entry

Respondent claims that Department staff entered respondent's property on November 25, 2018 without the consent or the permission of respondent and without an administrative search warrant and illegally seized evidence. Mr. Pacinello stated in his affidavit in support of the motion to dismiss (*Pacinello*) that he had been hunting on his property at 2992 Fish Brook Road, Tompkins, New York (*Pacinello* ¶ 3) on November 25, 2018 with youth hunter Domeneck Gambino when Mr. Gambino took a deer while hunting in the woods (*Pacinello* ¶¶ 13 & 14). Pacinello, Gambino and others left the property that day with the deer, after cleaning the deer on the property, and traveled to their residences on Long Island, NY (*Pacinello* ¶¶ 15 & 18). After leaving his Tompkins property to travel to Long Island, Mr. Pacinello's vehicle was stopped by BECI officer Wilbur and DEC Environmental Conservation Officer Nathan Hoig (ECO Hoig) who questioned him about the deer (*Pacinello* ¶¶ 18 & 19). Mr. Pacinello stated that after telling the officers that Gambino shot the deer, the officers congratulated Gambino and reminded him to report his kill and the vehicle traveled on to Long Island (*id.*). BECI officer Wilbur and ECO Hoig entered the property at 2992 Fish Brook Road sometime after stopping respondent's vehicle (*Wilbur* ¶ 11). Pacinello states he did not give DEC permission or authority to enter his property (*Pacinello* ¶ 22).

The affirmation of respondent's attorney Matera states that BECI officer Wilbur decided "for reasons unknown" to enter respondent's property after stopping respondent's vehicle as it traveled to Long Island (*Matera* at 4¹). According to Matera, the officer passed "clearly visible

¹ The December 31, 2020 affirmation of Michaelangelo Matera is entitled affirmation and sworn to under penalty of perjury but is written in the form of a brief so references to it are to the page number in the affirmation.

No Trespassing signs posted at the foot of the 650-foot driveway” (*Matera* at 4). The officer’s entry was without first obtaining a search warrant and, according to *Matera*, without “exigent circumstances” that would have allowed the warrantless entry (*Matera* at 4). After entering the property, the BECI officer observed the bait pile and blood in the snow and took possession of a trail camera memory card (*Matera* at 5).

The day after entering respondent’s property, the BECI officer applied for and was granted a search warrant to search the respondent’s property at 6229 Fish Brook Road, Tompkins (*Matera* at 5). According to respondent’s counsel, the application for the search warrant contains only information learned by the BECI officer after he entered respondent’s property (*Matera* at 5).

The affidavit of Officer Wilbur states that after stopping respondent’s vehicle at 8:53 am on November 25, 2018, Officer Wilbur and ECO Hoig continued patrolling and conducting compliance checks in the vicinity of Tompkins, NY (*see Wilbur* ¶¶ 8 & 9). Officer Wilbur and ECO Hoig continued patrolling on Fish Brook Road, noting another stop they made for a compliance check unrelated to this matter (*id.* ¶ 11). As the officers continued down Fish Brook Road, they observed fresh tire tracks in the driveway of 2992 Tompkins Road indicating someone was on the premises or had been recently (*id.*). They drove down the driveway to the end without observing any signage restricting access (*id.*). They observed blood in the snow and observed a camper and heard music playing (*Wilbur* ¶ 13). The officers were not aware that the property was owned by respondent (*id.* ¶ 11). The officers observed an empty apple bushel near the door of the camper and within 25 yards of the camper, apples, corn, and pelletized attractant (*id.* ¶¶ 12-14). ECO Hoig observed a trail camera overlooking the bait pile and took the memory card (*id.* ¶ 16). They knocked on the door of the camper, but no one answered, and they did not enter (*id.* ¶ 13). They observed a gambrel rack with blood, hair, and entrails beneath it (*id.* ¶ 17). Sometime later, after leaving the property and moving back into cell phone range, Officer Wilbur was able to look up property records (*id.* ¶ 18). At that time Officer Wilbur learned the property was owned by respondent and his wife, called respondent’s home, and his wife confirmed respondent was hunting on the property that day (*id.* ¶ 19). The officers did some additional investigation related to this property and respondent (*id.* ¶ 25). Later that day the officers spoke with respondent by phone. Respondent objected to the officers entering his property which prompted the officers to pursue a search warrant (*Wilbur* ¶¶ 25-27). The officers sought and were given a search warrant the next day by Tompkins Town Court (*id.*). The officers returned to the property on November 26, 2018 with the search warrant, obtained more evidence and viewed the material contained on the confiscated trail camera (*Wilbur* ¶ 27).

Department staff maintains that the officers’ actions of entering respondent’s property were a compliance check or camp check routinely carried out by Department officers in furtherance of their duties. ECL 71-0907 details the powers and duties of enforcement officers. ECL 71-0907(4)(b) authorizes officers to conduct a warrantless search “whenever they have cause to believe that any provision of this article or of any law for the protection of fish,

shellfish, crustacea, wildlife, game or protected insects has been or is being violated, and to use such force as may be necessary for the purpose of examination and search.”

On this motion to dismiss the complaint, I accept the facts as alleged in the complaint as true and accord the Department every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1997]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The facts alleged in the complaint are supported by the affidavit of Officer Wilbur.

Respondent argues that due to the Department’s illegal search and seizure of evidence that the Department is precluded from all use of the evidence obtained and the introduction of the evidence at trial. Department staff argues that because there was no illegal entry, exclusion or suppression of evidence should not be considered. As noted by the U.S. District Court for the Western District of New York, “New York DEC officers are authorized, *inter alia*, to enforce hunting licensing laws, N.Y. Evtl. Conserv. Law § 71–0907[2], and ’to search without search warrant ... whenever they have cause to believe that any provision of this article [Enforcement] or of any law for the protection of ... game ... has been or is being violated, and to use such force as may be necessary for the examination and search... ’ N.Y. Evtl. Conserv. Law § 71–0907[4]b” (*Goossens v Dept. of Evtl. Conservation*, 2011 WL 1198934). The actions of the officers were routine and in furtherance of their duties. Officer Wilbur’s affidavit states that the entry onto respondent’s property was to ensure the Fish and Wildlife Laws of the State were being complied with on the property.

For the reasons stated above, respondent’s motion to preclude or suppress evidence is denied. The parties will be allowed to fully develop a record at hearing regarding the circumstances surrounding Department staff’s inspection of the premises. Respondent will have the opportunity to make any objections about Department staff witnesses’ testimony and any evidence proffered in connection with that testimony.

2. Department Staff’s Motion for Leave to Serve Amended Complaint.

Department staff seeks an order granting leave to serve an amended complaint. The initial complaint was served on or about September 1, 2020. The motion for leave to serve an amended complaint was served on January 26, 2021. Leave to serve amended pleadings is addressed in Title 6 of Official Compilation of Code of Rules and Regulations of the State of New York (6 NYCRR), Part 622. Section 622.5 of 6 NYCRR allows pleadings to be amended “at any time prior to the final order of the commissioner by permission of the ALJ or the commissioner, and absent any prejudice to the ability of the other party to respond.” Section 622.5 references *CPLR 3025*, which allows for the amendment of pleadings barring prejudice to any party. Case law supports a finding that leave to amend shall be freely given.

Department staff has asked to amend the complaint as follows: (1) to state that respondent’s hunting license expired in August, 2019; (2) to delete a statement that the youth hunter told DEC ECOs that he shot the deer over a bait pile with respondent’s knowledge and

consent; and (3) to change all references to ECO from singular to plural to reflect that two officers were involved in this matter (*see proposed amended complaint*).

Respondent, by affirmation of Michaelangelo Matera, Esq. opposes the motion on the basis that the Department is seeking to change the facts alleged in the complaint to reflect “that the officer has changed his story in an attempt to come up with a new way to try to prove the allegations against respondent now that he has been caught fabricating the information...” (*see Matera at 3*)². Respondent cites case law that held that a party cannot assume a contrary position in a proceeding by amending pleadings (*Matera citing Kilcer v. Niagara Mohawk Power Corp, 86 AD 3d 682*). Respondent contends that amending the complaint to remove the youth’s statement about shooting the deer over the bait pile with respondent’s knowledge and consent is so significant that it is a change in position (*id.* at 4). The complaint alleges that the youth hunter confirmed in an interview with DEC ECOs that he had shot a deer with respondent’s knowledge and consent over a pre-established bait pile. The amended complaint removes the reference to the youth hunter making a statement and alleges the respondent arranged for and/or authorized the unlawful taking over the pre-established bait pile by the youth hunter (*see proposed amended complaint*).

Respondent also notes that he is prejudiced by the insertion into the amended complaint the name of a butcher who allegedly had relevant information regarding the incident. This is not part of the amendment to the complaint and I will not address this objection as it is factually inaccurate.

The alleged violations are the same in both the complaint and amended complaint. The courts have routinely allowed amendment of pleadings. The objections raised by respondent are to the facts of the case and are related to defenses that respondent may raise or objections that respondent may make at any hearing held herein. Respondent has not demonstrated any prejudice that he would incur by allowing service of the amended complaint. Respondent will be allowed to assert any defenses to the amended complaint

Accordingly, the motion for leave to serve an amended complaint is granted.

RULING

Based on the foregoing discussion, my rulings on the motions are as follows:

1. A. Respondents’ motion to dismiss based on illegal entry without an administrative search warrant is denied.

² Respondent counsel’s affirmation is written in unnumbered paragraph style, references to the affirmation refer to the page of the affirmation.

- B. Respondents' motion to preclude or suppress evidence based on illegal entry without an administrative search warrant is denied.
2. Department Staff's motion for leave to serve an amended complaint is granted.
 3. Department staff is directed to serve the amended complaint on respondent Nicholas Pacinello within fifteen (15) days of the date of this ruling. Respondent shall have thirty (30) days to serve an answer to the amended complaint.

/s/

Molly T. McBride
Administrative Law Judge

Dated: March 31, 2021
Albany, New York

APPENDIX A

Matter of Nicholas Pacinello
DEC File No. R4-2019-1230-91
Motion to Dismiss and Preclude
Motion to For Leave to Amend Complaint

Respondent Nicholas Pacinello's papers

1. Notice of Motion to Dismiss and Preclude dated December 30, 2020
2. Affirmation of Michaelangelo Matera, Esq. dated December 30, 2020 attaching Exhibits A, B & C
3. Affidavit of Nicholas Pacinello sworn to December 30, 2020
4. Affirmation in Reply, Michaelangelo Matera, Esq. dated February 1, 2021
5. Affirmation of Michaelangelo Matera, Esq. in opposition to Motion for Leave to Amend dated February 4, 2021

Department staff's papers

1. Cross Motion for Leave to Amend Complaint dated January 26, 2021 with Affirmation of Stephen Repsher, Esq. in support, dated January 26, 2021 with attached proposed Amended Complaint.
2. Affirmation of Stephen Repsher, Esq. in opposition to respondent's motion, dated January 26, 2021