

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations
of Article 17 of the Environmental
Conservation Law and Part 750 of
Title 6 of the New York Compilation of
Codes, Rules and Regulations

Ruling on Staff's
Motion for Order
Without Hearing

-by-

R.L. ROBERTS, LLC,
Respondent.

Case No. R2-20050323-105

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Summary of Ruling

New York State Department of Environmental Conservation (DEC or Department) staff's motion for an order without hearing dated June 17, 2005 is denied and the staff is directed to file a Statement of Readiness with the Office of Hearings and Mediation Services (OHMS) pursuant to § 622.9 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR) when it wishes to proceed to an adjudicatory hearing.

Proceedings

The Department staff commenced this proceeding against respondent R.L. Roberts, LLC (Roberts) by service of the notice of motion for an order without hearing and complaint dated June 17, 2005 along with supporting papers: the affirmation of Assistant Regional Attorney John K. Urda dated June 17, 2005, the affidavit of DEC Environmental Engineer II Chanchal K. Chakrabarti dated June 17, 2005, an order of the New York City Department of Environmental Protection (DEP) dated February 24, 2005, and a letter dated March 23, 2005 from Mr. Chakrabarti to R.L. Roberts, LLC. Staff's motion and complaint allege that the respondent violated various provisions of Article 17 of the Environmental Conservation Law (ECL) and § 750-1.3(d) of 6 NYCRR by discharging sanitary sewage into Newtown Creek via an unpermitted storm drain pipe connecting to the storm drain on the property of the respondent located at 500 Scott Avenue in Brooklyn, New York. Staff seeks a penalty of \$22,500 as well as an order requiring the respondent to undertake certain operation and maintenance with respect to its septic system to ensure that there is not a repeat discharge of sewage to the waters of the state from respondent's facility.

The OHMS received staff's papers on June 22, 2005 and Administrative Law Judge (ALJ) Helene G. Goldberger was assigned to this matter.

On July 12, 2005, counsel for Roberts, Wendy A. Marsh, Esq. of Hancock & Estabrook, LLP, filed with the OHMS an answer dated July 11, 2005 and an affirmation in opposition to staff's motion. Included with Ms. Marsh's affirmation are the following: the deed for the subject property; the lease agreements with the respondent's tenants at 500 Scott Avenue; the February 24, 2005 DEP order regarding the alleged illegal discharge to the storm drain at 500 Scott Avenue; the March 23, 2005 letter from Mr. Chakrabarti to Roberts; a letter dated April 21, 2005 from Mr. Urda to Daniel J. Brake, Esq., Associate General Counsel of respondent with a proposed order on consent; a letter dated May 12, 2005 from Ms. Marsh to Mr. Urda; a cover letter dated May 23, 2005 from Mr. Urda to Ms. Marsh with a revised proposed consent order; a letter dated June 13, 2005 from Ms. Marsh to Mr. Urda; and a freedom of information law request from Holly K. Austin of Hancock & Estabrook, LLP to DEP Bureau of Legal Affairs dated July 6, 2005. The respondent disputes the staff's allegation that there was an illegal discharge from the respondent's facility to Newtown Creek via a concealed sewer pipe and contends that the penalty and compliance measures staff seeks are excessive and onerous.

By letter dated July 14, 2005, Chief ALJ James T. McClymonds granted staff's request to file a response to respondent's opposition to staff's motion. Roberts did not oppose this request but requested the opportunity to file a surreply. The Chief ALJ directed staff to serve a reply by no later than July 25, 2005, and for the respondent to serve its surreply by no later than August 5, 2005.

The OHMS received staff's reply on July 28, 2005. Staff's reply consists of the affirmation of John K. Urda dated July 25, 2005 and the affidavit of Jorge Villacis, Section Chief of DEP's Bureau of Wastewater Treatment, Division of Pollution Control and Monitoring. The respondent's surreply was received by the OHMS on August 8, 2005 and consists of an affirmation by Ms. Marsh, a letter dated March 23, 2005 from DEP Deputy Commissioner Alfonso R. Lopez, R.E., to DEC Region 2 Regional Water Engineer Robert Elburn and the responses from DEP to Ms. Austin's FOIL requests. On August 8, 2005, the OHMS received by facsimile transmission a letter from Mr. Urda responding to Ms. Marsh's submission. Because the ALJ did not grant permission for this additional submission by staff, it was not considered in rendering this ruling.

Staff's Position

Based upon the actions of DEP, the Department staff became aware of the City's order citing the respondent's Scott Avenue facility for an illegal discharge from an unlawful connection of a septic tank to a storm sewer. Chakrabarti Aff., ¶¶ 6-7. In his June 17, 2005 affidavit, DEC Engineer Chakrabarti describes his site visit on March 18, 2005. Id., ¶¶ 8-9. Mr. Chakrabarti states that he spoke with a site manager who admitted to the "illegal septic tank overflow connection and the resultant discharge." Id. ¶ 8. According to this DEC engineer, the unnamed site manager further explained that the problem had been fixed; he opened the cover of the respondent's catch basin to show that the connection had been removed. Id., ¶ 9. Mr. Chakrabarti concludes that this illegal system allowed "bacteria-laden water . . . [to] mingle with the stormwater runoff from the trucking facility." Id., ¶ 10. He concludes that the illegal connection was particularly offensive because it was "concealed." Id., ¶ 12.

Respondent's Position

Ms. Marsh states in her affirmation that the respondent has leased the premises to a tenant since April 2000 and that the terms of the lease require the tenant to be responsible for maintenance and repairs. Marsh Aff., ¶¶ 4-6; Ex. B annexed to affirmation. She further claims that until the respondent received the DEP order, it was not aware of the subject pipe or any illegal discharge. Marsh Aff., ¶ 8. According to Ms. Marsh, after the tenant refused to remove the pipe, Roberts hired Green Plumbing and Heating, Inc. to remove it. Id., ¶¶ 9-10.

Ms. Marsh points out that on March 3, 2005, DEC staff visited 295 Lombardy Street, a location that she states is also occupied by the tenants of the respondent. At the 295 Lombardy Street location, DEC staff found an illegal connection between a septic tank and a storm sewer. Mr. Chakrabarti believed mistakenly that respondent was responsible for both properties. See, Exhibit D to Marsh affirmation. Ms. Marsh provides other information as to settlement discussions between staff and the respondent; which as staff notes in its response is not appropriate for my consideration. Urda Reply Aff., ¶¶ 3-4. In her surreply affirmation, Ms. Marsh points out that the staff's support for its motion consists of statements of individuals who did not witness the events in question. Marsh Surreply Aff., ¶¶ 7-13. She also noted the various addresses used in correspondence that did not relate to the property owned by the respondent. Marsh Surreply Aff., ¶ 9. Attorney Marsh argues

that there are several factual issues in question including whether the subject pipe discharged illegally, at what addresses was this discharge observed, whether the pipe was "concealed" and what relief is appropriate, if any. Id., ¶¶ 14-19, 22, 25. Finally, Ms. Marsh maintains that based on the "dearth of evidence in DEP's possession regarding any allegedly improper septic hookup at Respondent's property", DEC's complaint should be dismissed in its entirety. Id., ¶26.

Michael Gappa, a plumber who works at Green Plumbing & Heating, states that on March 14, 2005, he did the plumbing and septic work at 500 Scott Avenue together with two other employees of that company. Gappa Aff., ¶ 2. According to Mr. Gappa, this work entailed opening the asphalt pavement to expose a pipe that ran from the storm sewer to the septic tank; he cut and removed the storm pipe and capped the connection to the pipe on the septic tank. Id., ¶ 2. Mr. Gappa also makes some conclusions about the purposes of the pipe and its time of installation that may or not be relevant to these proceedings. Id., ¶¶ 3-4. He concludes that it was the septic tank that backed up into the house trap in the building at 500 Scott Avenue and that "the septic tank was full but did not reach the level of the septic tank storm pipe." Id., ¶ 5. Mr. Gappa states that the pipe he removed was empty, dry and clean - the implication being that the pipe did not discharge to the storm drain. Id., ¶ 7. He also notes that "[b]y their nature, septic tanks, sewers and all attendant pipes are typically underground. The fact that this storm pipe was underground does not indicate that the owner of the property or the tenant was intentionally concealing the storm pipe."

Discussion

Section 622.12(d) of 6 NYCRR provides that "[a] contested motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR [Civil Practice Law and Rules] in favor of any party." Section 622.12(e) provides that "[t]he motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing."

CPLR 3212(b) requires that papers in support of a motion for summary judgment must include an affidavit by a person with actual knowledge of the facts, must be based on admissible evidence, and must show that there is no defense to the cause of action. See, Winegrad v. New York University Medical Center, 64

NY2d 851 (1985). The motion should be denied if "any party shall show facts sufficient to warrant a trial on any issue of fact." Caruso v. New York City Police Dep't Pension Funds, NYLJ, Dec. 27, 1985 at 6, col.1 (Sup. Ct. NY Co.). If the opposing papers disclose the existence of a material issue of fact or even the "color" of a triable issue, summary judgment must be denied. Newin Corp. v. Hartford Acc. & Indemn. Co., 62 NY2d 916 (1984).

Staff did not witness the alleged unpermitted discharge but instead arrived at the respondent's premises to observe what steps Roberts had taken in response to DEP's directives. Chakrabarti Aff., ¶¶ 8-9; Exhibit A annexed to Chakrabarti affirmation. While Mr. Chakrabarti describes the results of the overflow from the septic tank to the storm drain, it is unclear what the source of his information is. Chakrabarti Aff., ¶¶10-12. In his reply affidavit, Section Chief Villacis states that DEP staff found the "concealed illegal overflow pipe . . . leading from the septic tank . . . to a catch basin." Villacis Aff., ¶¶ 5-6. Here too, the information is not based on direct knowledge but rather on information provided to this supervisor by his staff.

There was at least one important error made in the initial investigation of this site by DEC and DEP staff - the attribution of the Lombardy Street site to this respondent. While DEC attorney Urda attacks the credibility of Mr. Gappa because he is not a licensed plumber - the affiant states that he has worked for Green Plumbing & Heating for ten years and was directly involved in the DEP-directed work on the subject pipe. Therefore, his statements carry sufficient weight at this stage to find that a summary order is not appropriate. Moreover, consideration of credibility and weight nor not appropriate in summary judgment. Dyckman v. Barrett, 187 AD2d 553 (2d Dep't 1992).

Additionally, while staff's position that as owner, the respondent, is responsible for compliance with Article 17 is correct, the claims of Roberts with respect to the lease, the tenant's actions or omissions, resolution of the "concealment" issue, and the response of Roberts upon receipt of the DEP order are all potentially mitigating factors that could bear on any ordered penalty.

Conclusion

Staff's motion for an order without hearing is denied. The respondent has raised the existence of material issues of fact

with respect to liability and any potential penalty.
Accordingly, I direct staff to file a Statement of Readiness in
accordance with 6 NYCRR § 622.9 when it is ready to proceed to a
hearing.

Dated: Albany, New York
August 9, 2005

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

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