NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Section 480-a of the Real Property Tax Law and Part 199 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

RULING

DEC Case No.
R4-2016-0923-145

- by -

ROBERTA SCHNEIDER AND WAYNE ABBOTT,

Respondents.

Procedural History

Staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this administrative enforcement proceeding by providing written notice to Roberta Schneider and Wayne Abbott (respondents) of the Department's intent to file a notice of violation (see DEC Intent to File Notice of Violation [Notice of Intent[1]], dated August 30, 2016). The Notice of Intent relates to a tract (tract) of real property owned by respondents in the Town of Grafton that is currently certified as eligible for the forest tax exemption provided for under section 480-a of the Real Property Tax Law (RPTL). Staff alleges that respondents failed to give notice of a proposed timber cutting on the tract and failed to comply with the forest management plan (management plan) for the tract that was approved by the Department (see Notice of Intent). By letter dated March 30, 2017, respondents requested a hearing on the allegations set forth in the Notice of Intent.

Although, pursuant to 6 NYCRR 622.3(b)(2), the Notice of Intent takes the place of the complaint in this proceeding and respondents request for a hearing takes the place of the answer, Department staff served a notice of hearing and complaint, both dated May 22, 2017, on respondents by certified mail and respondents served an answer on June 16, 2017.

This ruling addresses Department staff's motion (motion), dated June 26, 2017, to dismiss the second affirmative defense set forth in respondents' answer. As agreed by the parties and

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[1] The Notice of Intent was issued by Department staff pursuant to 6 NYCRR 199.10(a), which requires that, where the Department determines that a notice of violation is to be issued, the Department must "notify the [land] owner in writing of its intention to issue [the] notice of violation . . . at least 30 days prior to the issuance of such notice of violation."

authorized by this office, respondents filed a response (response) to the motion which was timely received by this office on August 1, 2017.[2]

For the reasons set forth below, Department staff's motion is denied.

Discussion

The Department's uniform enforcement hearing procedures (6 NYCRR part 622) (hearing procedures) state that Department staff may move for clarification of an affirmative defense on the basis that it is so "vague or ambiguous . . . that staff is not thereby placed on notice of the facts or legal theory" of the defense (6 NYCRR 622.4[f]). The hearing procedures do not expressly provide for motions to dismiss affirmative defenses.

Nevertheless, given the broad authority of an ALJ to rule upon motions filed by parties in these proceedings,[3] this office routinely considers such motions (see e.g. Matter of Giacomelli, ALJ Ruling, July 17, 2017; Matter of Gramercy Wrecking and Evntl. Contrs., Inc., ALJ Ruling, Jan. 14, 2008). Where, as here, the Department's hearings procedures do not expressly address a motion filed by a party, the CPLR may be consulted for guidance (see Matter of Makhan Singh and L.I.C. Petroleum Inc., Decision and Order of the Commissioner, Mar. 19, 2004, at 2 [noting that, in the absence of notice requirements in the default procedures under NYCRR part 622, the CPLR should be consulted for the appropriate procedure]).

In accordance with CPLR 3211(b) "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." However, a motion to dismiss an affirmative defense should not be granted where there is any doubt regarding whether the defense is viable (see e.g. New York Univ. v Cont. Ins. Co., 87 NY2d 308, 323 [1995] [holding that "it was error to dismiss the affirmative defense at this early pleading stage of the litigation, because plaintiff had yet to establish that the affirmative defense was meritless as a matter of law"]; Federici v Metropolis Night Club, Inc., 48 AD3d 741, 743 [2d Dept 2008] [holding that "[i]f there is any doubt as to the availability of a defense, it should not be dismissed"]). Further, in evaluating a motion to dismiss a defense, this office will liberally construe respondent's pleadings, accept respondent's factual assertions as true, and make every reasonable inference in favor of the respondent (see DeThomasis v Viviano, 148 AD3d 1338,

[2] Staff attempted service of the motion on respondents' counsel by certified mail. This manner of service is not authorized under 6 NYCRR part 622. Pursuant to 622.6(a)(1), service of interlocutory papers is governed by CPLR 2103. CPLR 2103 authorizes service by first class mail (see CPLR 2103[b][2], [f][1] [defining "mailing" as meaning "first class" mail]). Certified mail does not satisfy this requirement (see Welch v State, 261 AD2d 537, 538 [2d Dept 1999] [holding that service of a motion "by certified, rather than first-class, mail did not comply with statutory requirements [of CPLR 2103] and deprived the court of jurisdiction to entertain the motion"]). Accordingly, this office took no action on the motion until after respondents' counsel advised, by letter dated July 14, 2017, that they had agreed to file a response on or before August 1, 2017.

[3] See e.g. 6 NYCRR 622.10(b)(1)(i) (authorizing the ALJ to "rule upon motions and request, including those that decide the ultimate merits of the proceeding"), 6 NYCRR 622.10(b)(1)(x) (authorizing the ALJ to "do all acts and take all measures necessary for the . . . efficient conduct of the hearing").

1339 [1st Dept 2017] [holding that "[p]laintiffs, as the parties seeking to dismiss the affirmative defenses, bore the heavy burden of demonstrating that the defenses lacked merit as a matter of law" and that "[i]n reviewing plaintiffs' motion . . . we liberally construe the pleadings, accept the facts alleged by defendant as true and afford him the benefit of every reasonable inference"]).

Department staff argues that respondents' "Second Affirmative Defense is meritless and must be dismissed" (affirmation of Dusty Renee Tinsley [Tinsley affirmation], dated June 26, 2017, ¶ 15). Respondents' second affirmative defense states that:

> "Respondents' failures to comply with the filing and notice requirements and the Updated Certificate of Approval (2013) . . . were due to reasons beyond the control of Respondents" (answer ¶ 26).[4]

Department Staff's argument that this defense must be dismissed is based upon the premise that the Commissioner's order in Matter of Hansen, wherein the Commissioner concurred with the ALJ's determination, after hearing, that the respondents' affirmative defenses were meritless (id., Order of the Commissioner, Dec. 22, 2009, at 2). In his concurrence, the Commissioner stated that "respondents, in engaging a logging company, had a duty to ensure that the logging was performed pursuant to their management plan and in accordance with the applicable legal requirements" (id.).

As Department staff notes, the respondents in Hansen asserted that they had relied upon a professional logging company and the logging company's failure to abide by the management plan was beyond respondents' control. Similarly, in this proceeding, respondents assert that they relied upon professional foresters to oversee the logging operation (affidavit of Wayne Abbott [Abbott affidavit], sworn on July 31, 2017, ¶¶ 5-9). As discussed below, however, this similarity falls far short of warranting the dismissal of respondents' second affirmative defense.

First, it must be emphasized that the Commissioner's order in Hansen was issued after hearing. Respondents in that case were given a full opportunity to present their affirmative defenses at hearing, the ALJ determined that respondents failed to meet their burden of proof as to those defenses, and the Commissioner concurred with that determination. Here, largely on the basis of Hansen, Department staff seeks to dismiss respondents' second affirmative defense before the hearing.

Second, I note that two prongs must be satisfied under 6 NYCRR 199.10(d) for the Department to conclude that a violation has not occurred, despite a respondent's failure to comply with the forest tax regulations. In addition to the failure being caused by "reasons beyond the control" of the respondent, it must also be demonstrated that the "failure can be corrected forthwith without significant effect on the overall purpose of the management plan" (id.).

[4] The "filing and notice requirements" and the "Updated Certificate of Approval (2013)" referred to in this affirmative defense relate to requirements imposed under RPTL 480-a on land owners who elect to participate in the forest tax exemption program.

In Hansen, Department staff asserted that "the logging performed was so extensive that the program could no longer apply due to the lack of the required minimum acreage of 50 acres" (id., Hearing Report at 2). The ALJ concurred, holding that "[e]ven if one could find that these landowners were misled by the logging company's promises and therefore the failure to comply with the program was outside their control . . . the damage that has been done could not 'be corrected forthwith without significant effect on the overall purpose of the plan'" (id. at 7-8). Thus, both prongs of 6 NYCRR 199.10(d) were absent in Hansen.

Here, in contrast, no documentation before me indicates that respondents' alleged violations have resulted in damage that could not be readily corrected without significant effect on the overall purpose of the management plan. Moreover, respondents represent that fewer than 130 of the roughly 240 acres in the program were affected by the alleged violations, and respondents further assert that they will proffer testimony of a professional forester to the effect that the violations of the management plan can be corrected (affirmation of Thomas A. Ulasewicz [Ulasewicz affirmation], dated July 31, 2017, ¶ 8). Therefore, unlike Hansen, respondents here may be able to successfully demonstrate that they can satisfy the second prong of 6 NYCRR 199.10(d).

Third, and most importantly, the papers before me demonstrate significant factual distinctions exist between Hansen and this matter with regard to whether the alleged violations were "beyond the control" of respondents. In Hansen, the ALJ held that it was "clear that the respondents were swayed by the lure of a substantial sum of money" rather than by a desire to comply with the management plan (id., Hearing Report at 7). The ALJ noted that "[t]he very contract that they entered into with the logging company provides that there were no encumbrances on the property to prevent the logging operation" (id.). The ALJ also noted that if respondents "had honest doubts about the commercial contract and logging operation, they would have contacted the forestry company . . . that had advised them on their 480-a program. They chose not to seemingly because they would have received an answer that would not have been favorable to the quick economic returns of the logging operation" (id.).

Not only does Department staff fail to demonstrate that facts similar to those present in Hansen are also present here, staff concedes that respondents:

> "may not have: been 'swayed by the lure of a substantial sum of money'; signed a contract providing that 'there were no encumbrances on the property to prevent the logging operation'; and chosen not to contact their forester because 'they would have received an answer that would not have been favorable to the quick economic returns of the logging operation'" (Tinsley affirmation ¶ 20).

Despite the foregoing, Department staff argues that "the finding in Hansen that the 'reasons beyond the control of the owner' defense was meritless, based on the actions of third party hires, remains relevant" (Tinsley affirmation ¶ 20). On this, I agree. The holding in Hansen is relevant. It is not, however, dispositive. I do not read Hansen as foreclosing the possibility that 6 NYCRR 199.10(d) may be invoked where a violation has occurred as the result of the actions of a third party hired by the landowner.

Among other things, respondents attest that they (1) sought to be faithful to the requirements of RPTL 480-a (Abbott affidavit ¶ 4); (2) consistently engaged the services of professional foresters for that purpose (id. ¶¶ 5, 11, 12 [attesting that respondents had used three foresters in the years prior to the alleged violations, and that the third forester was overseeing forest management operations at the time of the alleged violations]); (3) successfully relied upon these professional foresters in the past to oversee implementation of the management plan (id. ¶¶ 5, 6, 8, 9); and (4) visited the tract during the time that forest management operations where undertaken (id. ¶ 15).

Accepting respondents' factual assertions as true, as I must in the context of this motion, the facts presented here are plainly distinguishable from the facts presented in Hansen.

Conclusion

On the motion papers before me, I conclude Department staff has failed to meet its heavy burden to demonstrate that the respondents' second affirmative defense should be dismissed. Accordingly, staff's motion is denied and respondents may present evidence at hearing in support of their second affirmative defense.

Although respondents have avoided the dismissal of the second affirmative defense, the burden of proof at hearing regarding this defense remains with respondents (see 6 NYCRR 622.11[b][2]).

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: August 15, 2017
Albany, New York

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