STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law (ECL) of the State of New York and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

RULING

DEC Case No.
R2-20170921-01

- by -

IRENE SOLOWAY, Individually and as Executrix of the ESTATE OF SAUL SOLOWAY, and ESTATE OF SAUL SOLOWAY,

Respondents.

Appearances of Counsel:

-- Thomas Berkman, Deputy Commissioner and General Counsel (Benjamin Conlon, Associate Attorney, of counsel), for staff of the Department of Environmental Conservation

-- Roland R. Acevedo, Esq. for respondents

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, dated January 29, 2019, upon respondents Irene Soloway, individually and as executrix for the estate of Saul Soloway, and the Estate of Saul Soloway. Respondents served an answer, dated April 8, 2019, upon Department staff.

The complaint alleges, in five unnumbered causes of action, that respondents violated: (i) ECL 27-0914(2) by disposing of hazardous waste without authorization; (ii) 6 NYCRR 373-3.9(d)(3) by failing to properly label containers holding hazardous waste; (iii) 6 NYCRR 372.2(b)(5)(i) by shipping hazardous waste offsite without an accompanying hazardous waste manifest; (iv) 6 NYCRR 372.2(b)(5)(ii) by offering a shipment of hazardous waste to a transporter who was not authorized to transport the particular waste; and (v) 6 NYCRR 372.2(b)(5)(iii) by shipping a hazardous waste to other than an authorized facility. Department staff requests the imposition of a one hundred twenty-five thousand dollar ($125,000) penalty against Irene Soloway, a seventy-five thousand dollar ($75,000) penalty against the estate of Saul Soloway, and reimbursement from respondents for costs incurred by the Department to

remediate and properly dispose of the hazardous waste in the amount of $167,948.89 plus interest.

Respondents' answer denies the allegations of the complaint. In addition, by letter dated March 7, 2019, respondents requested the matter be stayed for at least six months due to Irene Soloway's serious medical issues. By letter dated July 2, 2019, Department staff filed a statement of readiness and requested that the matter be scheduled for hearing as soon as possible. Department staff's letter expressed concerns that respondent Irene Soloway had disbursed funds from the estate despite knowledge of the liability to the State for cleanup costs incurred by the Department and that Irene Soloway had filed bankruptcy. Staff argues that further delays in this proceeding would prejudice the Department's ability to recover the moneys already expended by the State.

On July 17, 2019, I convened a conference call with the parties to determine a hearing schedule. Respondents, through their attorney, continued to argue that the matter could not proceed because of the health of Irene Soloway and that of her husband, Gene Marrotte, who allegedly is a material witness. Department staff offered that the hearing could be held in the White Plains sub-office for the convenience of respondents and their attorney. I directed respondents' counsel to provide me with updated letters from Irene Soloway's treating physicians and to provide me with dates when she could appear. I directed Department staff to provide me with a short briefing regarding the effect of the bankruptcy, if any, on this proceeding.

On July 26, 2019, respondents' counsel provided letters from two of Irene Soloway's doctors. One letter, dated July 17, 2019, stated that Irene Soloway is unable to participate in legal proceedings for at least six months and stated that if there were any questions, to call him. The same physician, in a separate letter, stated that Mr. Marrotte was permanently disabled and is unable to participate in legal proceedings.

Department staff objects to further delays in this proceeding. Staff called the doctor who stated that Irene Soloway is unable to participate in legal proceedings for at least six months, and according to staff, the doctor advised staff that Irene Soloway could participate by phone from her house and suggested her attorney should be at her house as well. Respondents' attorney objects to this suggested conduct of the hearing and argues that he has a right to be present and confront staff's witnesses.

DISCUSSION

Continuance due to medical issues

If the party requesting a continuance has made diligent efforts to attend the proceedings but is unable to because of a medical issue, and the other party would not be prejudiced by granting the continuance, the continuance should be granted (*see Englert v Hart*, 112 AD2d 3, 3 [4th Dept 1985]). However, a court may be justified in refusing to grant the continuance if the moving party cannot show they made diligent efforts to secure the appearance, cannot provide affidavits or other documents demonstrating that the party is unable to attend for a medical

reason, or cannot indicate when the party may be able to proceed (*see Le Jeunne v Baker*, 182 AD2d 969, 969-970 [3d Dept 1992]).

In *New York TRW Insurance*, the Appellate Division found no abuse of discretion by Supreme Court in denying a motion for a new trial or continuance where defendant was unable to attend trial because he had been hospitalized. Supreme Court had advised that the trial would continue, and defendant's testimony would be taken later if necessary. Defendant's counsel appeared at trial and made a written motion for a new trial or continuance based on defendant's illness. However, counsel made no indication that defendant would be available for trial if the continuance were granted and made no claim defendant would testify or that his testimony would be material. Accordingly, the motion was denied. (*See New York TRW Insurance, Inc. v Wade's Canadian Inn & Cocktail Lounge, Inc.*, 241 AD2d 845, 846 [3d Dept 1997]).

Here, respondent Irene Soloway claims she will be unable to appear in legal proceedings for a minimum of six months because of medical issues. Further, her husband, Gene Marrotte, is permanently disabled and will be unable to appear at all. The six-month request does not indicate any actual date when Irene Soloway would be available.

I agree with Department staff that there may be no end to respondents' request to delay the hearing. There are no assurances from respondents that Irene Soloway will be able to proceed six months from now or one year from now. Mr. Marrotte, claimed by respondents' counsel to be a material witness, will never be able to appear at a hearing according to the physician's letter.

Respondents' counsel requests that he be heard with a court reporter present before I rule so that he can make a record. The request for oral argument is denied. Counsel was directed to provide me with a time frame or dates when Irene Soloway could appear. He has not done so. In addition, counsel has not made any indication that Irene Soloway would be available for hearing if a continuance was granted. Accordingly, respondents' request to delay this matter for another six months is denied.

Bankruptcy automatic stay

As requested, Department staff provided me with a short brief on the effects of the automatic stay on this proceeding. Department staff states that the Department has broad but not unlimited authority to pursue action under 11 USC § 362 (b) (4). The Department may order parties to perform environmentally necessary preventative or remedial work and may assess damages and penalties through the administrative process. Although the Department may fix the monetary amounts of damages and penalties, it may not initiate actions to enforce a monetary judgment outside of the bankruptcy action. In short, the automatic stay imposed by 11 USC § 362(a), does not prevent the Department from prosecuting the violations of the ECL, and regulations promulgated pursuant thereto, and does not prevent the Commissioner from assessing penalties and other relief against respondents.

Previous orders of the Commissioner and rulings of administrative law judges support staff's position and confirm that the exception to the automatic stay provided by 11 USC § 362(b)(4) is applicable to this proceeding. In short, this matter may proceed to its administrative conclusion without violating the automatic stay (*see Matter of L. Robinson Excavating, Inc.*,

Order of the Commissioner, May 31, 2005; *Matter of Roger Kimball*, Order of the Commissioner, April 15, 1991; *Matter of Oil Co., Inc.*, Ruling, December 31, 1996).

RULING

Respondents' request to delay the hearing in this matter is denied. The matter will be scheduled for hearing.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: August 6, 2019
Albany, New York