STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 71 of the Environmental Conservation Law and Article 12 of the New York State Navigation Law,

- by -

S&S CADILLAC MOTORS CORP. n/k/a KRISTAL AUTO MALL CORP.,

Respondent.

RULING ON MOTION FOR DEFAULT JUDGMENT

DEC Case No. R2-20090309-144

Summary

This ruling denies a motion for a default judgment made by the staff of the Department of Environmental Conservation (DEC) and grants a motion to reopen the default made by S&S Cadillac Motors Corp. n/k/a Kristal Auto Mall Corp. (respondent). The ruling directs the respondent to file an answer by August 14, 2009.

Background

The respondent operates an automobile dealership and repair shop at 5200 Kings Highway, Brooklyn, NY (site). According to the respondent's papers, the respondent has operated at the site since 1992 under a sublease. The site is reportedly owned by Irma Pollack, LLC and leased to OP Development Corp. The site was previously operated by General Motors Corporation.

A petroleum spill was discovered at the site and reported to DEC Staff in April 2007 (DEC Spill # 0701186). The respondent entered into a stipulation with DEC Staff on October 21, 2008. The stipulation was made pursuant to section 17-0303 of the Environmental Conservation Law (ECL) and section 176 of the Navigation Law (NL) (DEC file #R2-20081020-505). The stipulation and attached Corrective Action Plan (CAP) required the respondent to undertake certain actions associated with the clean up in accordance with a detailed compliance schedule. Included in this schedule was the requirement that the respondent submit a Remedial Action Report (RAR) within 90 days of the effective date of the stipulation, January 19, 2009. No RAR has been filed.

Proceedings

On April 9, 2009, DEC staff served the respondent with a notice of hearing and complaint by certified mail. The complaint alleged that the respondent had failed to submit a RAR, which was due on or about January 19, 2009. The complaint seeks a civil penalty of $30,000 and immediate compliance with the stipulation.

Respondent's answer was due on April 29, 2009, pursuant to section 622.4(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR 622.4(a)). No answer has been received by DEC Staff.

On or about May 4, 2009, counsel for the respondent contacted DEC Staff counsel by telephone. The accounts of this conversation differ regarding who spoke to whom and what was said on this phone call. However, it is clear from the posture of the case that DEC Staff refused to grant the respondent an extension to file an answer.

By papers dated May 19, 2009, DEC staff filed a notice of motion for default judgment with the Department's Office of Hearings and Mediation Services (OHMS). The motion was also served on respondent's counsel.

By affirmation dated May 26, 2009, respondent's counsel opposed DEC Staff's motion for default judgment. Attached to respondent's papers was a copy of an amended complaint in a civil matter pending in New York State Supreme Court, New York County involving the same petroleum spill at issue in this case.

By letter dated June 3, 2009, Chief Administrative Law Judge James T. McClymonds informed the parties that I was assigned this matter.

By letter dated June 22, 2009, DEC Staff requested an opportunity to respond to respondent's papers. By letter dated June 23, 2009, I granted DEC Staff's request.

DEC Staff responded with a reply affirmation dated June 29, 2009. The following day, DEC Staff submitted a revised version of this affirmation.

By memo dated June 30, 2009, DEC Commissioner Grannis delegated decision making authority in this case to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation

Services, a copy of which is attached to this ruling.

Discussion

I will treat the respondent's May 26, 2009 submission as a motion to reopen the default. Motions for reopening a default judgment are addressed in 6 NYCRR 622.15(d):

> "(d) Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists".

In this case, no default judgment has been granted by the Commissioner (or his designee), so the regulations authorize the ALJ to grant the motion to reopen the default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists.

There is no dispute that the notice of hearing and complaint were served on the respondent on April 9, 2009 or that an answer was due by April 29, 2009. DEC's Uniform Enforcement Hearing Procedures state that "[f]ailure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing" (6 NYCRR 622.4(a)). In this case, the respondent is in default. The respondent claims both a meritorious claim and a reasonable excuse for the default, and seeks to reopen this default.

Likelihood of a Meritorious Defense

With respect to the likelihood of a meritorious defense, the respondent claims that it intended to carry out the requirements of the stipulation but that the landlord and tenant of the site refused to allow the respondent, the sub-tenant, from implementing the terms of the stipulation. Specifically, after receiving notice of the stipulation, the landlord employed its own environmental inspector who determined that the spill at the site included petroleum from the 1960s, when General Motors occupied the site. The matter is now the subject of litigation in Supreme Court, New York County (Index No. 150059/08).

In his revised reply affirmation, DEC Staff counsel argues that the respondent has failed to show the likelihood of a

meritorious defense. After the stipulation was executed, counsel states that the respondent did not communicate with DEC Staff regarding compliance with the stipulation. Counsel continues that the ongoing civil case regarding the spill and the assertion that the landlord and tenant are preventing compliance with the stipulation are insufficient to prove a meritorious defense.

Based on the facts asserted in this case, I find that the respondent's claim that it is prevented from complying with the stipulation by third parties raises the likelihood of a meritorious defense. At hearing, after the proof is submitted and evaluated, it may be determined that this defense is with or without merit, but for the purposes of reopening the default, the likelihood of a meritorious defense has been shown by the respondent.

Reasonable Excuse for the Default

As discussed above, the respondent's answer was due on or about April 29, 2009 and no answer has been received. Respondent's counsel argues that when the respondent received the notice of hearing and complaint on April 9, 2009, his client did not realize that a complaint was attached behind the notice of hearing or that he needed to respond to the complaint (only that he needed to attend the pre-hearing conference which was scheduled for May 5, 2009). There is no dispute that DEC Staff did not send a copy of the complaint to respondent's attorney or that respondent's attorney had represented respondent during the discussions preceding the execution of the stipulation in October 2008. Respondent's counsel argues that as the attorney of record, he should have been sent a copy of the notice of hearing and complaint. DEC Staff counsel argues that the execution of the stipulation was a separate, non-enforcement matter, and, therefore, respondent's counsel was not the attorney of record in this case.

DEC's regulations governing administrative enforcement hearings provide in relevant part (6 NYCRR 622.6(a)(1)) that Rule 2103 of the Civil Practice Law and Rules (CPLR) will govern the service of papers. Rule 2103 requires that papers must be served upon a party's attorney in a pending matter. DEC Staff argues that the enforcement of the stipulation is a different matter and service on respondent's attorney was not required.

Whether or not the execution of the stipulation and the subsequent enforcement of the same stipulation are same matter or not, DEC Staff should have sent a copy of the notice of hearing

and complaint to respondent's attorney in this case. While a strict reading of CPLR 2103 may not have legally required it, the papers should have been provided as a professional courtesy and to prevent prejudice to the respondent. The close nexus in time between the execution of the stipulation and its subsequent enforcement under the facts here also support copying respondent's attorney on the papers.

In addition, given the facts of this case, DEC Staff should have granted respondent's counsel's May 4, 2009 request for an extension of time to answer. Respondent's answer was due on April 29, 2009, a Wednesday and respondent's counsel contacted DEC Staff the following Monday, May 4, 2009. As Professor Siegel states "it is common practice, and deemed common courtesy among attorneys to allow one another reasonable extensions of time to plead" (New York Practice, Fourth Edition, p. 383). While such requests should be made before the default occurs, in this case, where DEC Staff failed to provide respondent's counsel with a copy of the papers and respondent's counsel called the first business day after being contacted by his client, the request should have been granted.

Ruling

DEC's enforcement hearing regulations provide that "[t]o avoid prejudice to any of the parties, all rules of practice involving time periods may be modified by direction of the ALJ" (6 NYCRR 622.6(f)). Based on the papers submitted I find that the respondent has demonstrated both the likelihood of a meritorious defense and a reasonable excuse for its default.

DEC Staff's motion for a default judgment is denied and the respondent's motion to reopen the default is granted. Respondent shall serve an answer on both DEC Staff, and file a copy with me, no later than close of business August 14, 2009.

Dated: Albany, New York
July 13, 2009

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge