STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 15, 25, and 34 of the New York State Environmental Conservation Law (ECL) and Parts 505, 608, and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

- by -

ROBERT I. TOUSSIE, JOGLO REALTIES, INC., T.Z. BROTHERS GENERAL CONTRACTORS, INC., LELLO G. ZODIACO, and ANTONIO ZODIACO, personally and as chief executive officer/sole shareholder of T.Z. Brothers General Contractors, Inc.,

Respondents.

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION TO ENFORCE STIPULATION

DEC File No. R2-20130724-348

June 16, 2016

Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General Counsel (Jessica Steinberg Albin of counsel), for staff of the Department of Environmental Conservation

-- Brown & Palumbo, PLLC (Gregory M. Brown of counsel), for respondents Robert I. Toussie and Joglo Realties, Inc.

-- Menicucci Villa Cilmi, PLLC (Jeremy Panzella of counsel), for respondents T.Z. Brothers General Contractors, Inc., Lello G. Zodiaco, and Antonio Zodiaco

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE
ON MOTION TO ENFORCE STIPULATION[1]

Respondents Robert I. Toussie and Joglo Realties, Inc. (the Joglo respondents) move for a ruling to enforce a stipulation extending respondents' time to answer the complaint in this proceeding, and request an extension of the Joglo respondents' time to answer until after a ruling is issued on this motion. For the reasons that follow, the Joglo respondents' motion is denied.

I. Proceedings

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint dated July 8, 2014 (see Affirmation of Karen L. Mintzer in Opposition to Motion to Enforce Stipulation [Mintzer Affirm], Exh A). In the complaint, Department staff alleges several violations of ECL article 15, title 5 (Protection of Waters Act), article 25 (Tidal Wetlands Act), article 34 (Shoreowners Protection Act or Coastal Erosion Hazard Area Law), and their implementing regulations, and the Department's General Permits GP-2-12-002 and GP-2-13-003. The violations arise from respondents' alleged reconstruction of an esplanade along the shoreline of the Atlantic Ocean at a site located in Brooklyn, Kings County, that was damaged by Superstorm Sandy.

Department staff counsel granted the Joglo respondents several extensions of time to file an answer to the July 2014 complaint, first to September 2, 2014 and then to October 2, 2014 (see Albin Letter [5-26-16], Affirmation of Gregory M. Brown [Brown Affirm], Exh 2). On September 12, 2014, former Regional Attorney Lou Oliva stayed the October 2, 2014 deadline and notified the Joglo respondents' former counsel, Michael Bogin of Sive, Paget & Riesel, P.C., that a meeting to discuss settlement would be scheduled, at which time a new date for submittal of the answer would be discussed (see Oliva Email [9-12-14], Affirmation of Michael Bogin [Bogin Affirm], Exh A).

[1] Prior to assignment of a trial Administrative Law Judge (ALJ), pre-hearing motions are filed with and ruled upon by the Chief ALJ (see 6 NYCRR 622.6[c][1], [d][1]).

The settlement meeting did not occur at that time and the Joglo respondents' time to answer remained stayed until August 20, 2015, when current Regional Attorney Karen Mintzer sent Mr. Bogin an email that stated, "This confirms our discussion that your client's time to answer the complaint is extended until 30 days after the date of a meeting with Department technical staff regarding the structures that are the subject of the complaint" (Mintzer Email [8-20-15], Bogin Affirm, Exh B).

A settlement meeting was held on October 2, 2015 attended by technical and legal staff from the Department, and consultants and counsel for the Joglo respondents. Among other things, respondents offered to provide an engineering analysis to aid settlement discussions on some of the Department's claims.

On November 2, 2015, Mr. Bogin sent an email to Ms. Mintzer following up on the October 2, 2015 meeting and subsequent telephone conversations, and confirming that the Joglo respondents would be undertaking the engineering analysis (EA) discussed at the meeting (see Bogin Email [11-2-15], Bogin Affirm, Exh C). In that email, Mr. Bogin stated, "As discussed, we understand that the above Enforcement Proceeding will continue to be suspended until a reasonable time after the Department makes a final decision whether to accept or reject the EA. However, as you emphasized, we also understand that if the Department accepts the EA there may remain outstanding unresolved issues in the enforcement proceeding including alleged statutory violations and penalties" (id.). Ms. Mintzer responded to Mr. Bogin's November 2, 2015 email by email of the same date (see Mintzer Email [11-2-15], Bogin Affirm, Exh D, at 2-3). In her response, Ms. Mintzer neither confirmed Mr. Bogin's understanding nor otherwise addressed the suspension of the enforcement proceeding (see id.).

On February 2, 2016, the Joglo respondents provided the engineering analyses to the Department (see id. at 1). On April 6, 2016, the Joglo respondents filed a complaint in the United States District Court, Eastern District of New York, raising constitutional claims against the Department (see Joglo Realties, Inc. v New York State Dept. of Envtl. Conservation, Civ. No. 1:16-cv-01666-AAR-CLP [federal action]).

On May 4, 2016, Ms. Mintzer sent a letter to Mr. Bogin stating the Department's understanding that the Joglo respondents had filed a lawsuit in federal court against the Department and one of its individual employees alleging civil rights violations related to the Department's handling of the claims that are the subject of the July 2014 complaint (see Mintzer Letter [5-4-16], Bogin Affirm, Exh E). Ms. Mintzer noted that the Department had consented to requests for adjournments of the Joglo respondents' time to answer and that in August 2015, "had agreed to a further adjournment so that settlement discussions could proceed following a technical meeting regarding some of the structures that are the subject of the Department's complaint" (id.). Ms. Mintzer notified Mr. Bogin that "[b]ecause your client has taken an adversarial position by filing a lawsuit against the Department, the Department is discontinuing settlement discussions at this time" (id.). Accordingly, Ms. Mintzer stated, "Notwithstanding any prior adjournments by the Department, all of which were agreed to before filing of the federal lawsuit, an answer to the Department's complaint is due on or before June 3, 2016. No further extensions will be granted. In addition, a prehearing conference at our office before an Administrative Law Judge is scheduled for June 22, 2016, at 10:30 a.m." (id.).

Because Mr. Bogin was a witness to the federal action, he withdrew as counsel in the administrative enforcement proceeding, and Gregory Brown of Brown & Palumbo, PLLC, was substituted as counsel on May 23, 2016. Thereafter, Mr. Brown sought a 45-day extension of the Joglo respondents' time to answer. By letter dated May 26, 2016, Department staff extended the deadline to answer to June 13, 2016, and noted that the pre-hearing conference remained scheduled for June 22, 2016 (see Albin Letter [5-26-16], Brown Affirm, Exh 2).

Under cover letter dated June 7, 2016, the Joglo respondents filed a motion to enforce stipulation and supporting affirmations of Mr. Bogin and Mr. Brown. By their motion, the Joglo respondents seek an order requiring Department staff to fulfill its obligations under the stipulation described by Mr. Bogin in his November 2, 2015 email to provide a good faith response to the engineering analysis and continue the stay of the proceeding until a reasonable time after staff produces the required response. In their cover letter, the Joglo respondents also requested that the deadline of June 13, 2016 to answer the

complaint be extended until such time as respondents' motion is ruled on and a deadline set in the ruling.

By email dated June 10, 2016, I granted the Joglo respondents' request for a stay of the time to answer pending assignment of the motion to an ALJ and a ruling on the motion.

On June 13, 2016, Department staff filed papers in opposition to the motion consisting of the Mintzer affirmation and a memorandum of law. Also on June 13, 2016, counsel for the remaining respondents filed an email noting his appearance in the proceeding, and joining the motion (see Panzella Email [6-13-16]). Although the remaining respondents are joining the motion, they declined to file any formal briefs or submissions. In addition, in the email, counsel noted that the time for the remaining respondents to interpose an answer had been extended to June 22, 2016, and indicated that they intend to meet that deadline.

In the interests of administrative efficiency and due to the pending pre-hearing conference scheduled for June 22, 2016, pursuant to 6 NYCRR 622.6(c)(1) and (d)(1), I am ruling on respondents' motion to enforce the stipulation prior to assignment of a hearing ALJ.

II. Discussion

In support of the motion, the Joglo respondents argue that as documented in Mr. Bogin's November 2, 2015 email, Department staff stipulated to continue to stay this enforcement proceeding until a reasonable time after the Department made a final decision on whether to accept or reject the engineering analysis that was supplied to the Department on February 2, 2016. Respondents assert that staff breached the stipulation when it terminated the stay and set the June 13, 2016 deadline to answer on the basis of the filing of the federal action by the Joglo respondents. Consequently, the Joglo respondents seek an order enforcing the November 2, 2015 stipulation as described in their papers.

In response, Department staff argues that it never entered into a stipulation with the Joglo respondents and, in any event, never agreed to condition its ability to withdraw from voluntary settlement discussions with respondents.

Accordingly, staff contends that it retained the right to terminate settlement discussions upon respondents' filing of the adversarial federal action and require respondents to file an answer, which it exercised through staff's May 4, 2016 letter (see Mintzer Letter [5-4-16], Bogin Affirm, Exh E). Department staff has the better argument.

Stipulations of counsel are contracts by which opposing parties chart the course of their own litigation (see McCoy v Feinman, 99 NY2d 292, 302 [2002]; U.S. Bank Nat'l Assn. v Mask, 139 AD3d 1043 [2d Dept 2016]; see also 6 NYCRR 622.18[c] [any time prior to receipt of the ALJ's report or recommended decision, Department and respondent may enter into a stipulation on any matter (emphasis added)]). Such stipulations include agreements of counsel concerning procedural steps in a proceeding, including extensions of time to file answers (see Columbia Broadcasting Sys., Inc. v Roskin Distribs., Inc., 31 AD2d 22, 24-25 [1st Dept 1968], affd on other grounds 28 NY2d 559 [1971]; see also 6 NYCRR 622.4[a] [the time to answer may be extended by consent of Department staff]). As in civil judicial proceedings, principles of judicial economy and fundamental fairness demand that stipulations of counsel reduced to writing or entered orally on the record be enforced in administrative proceedings (see McCoy, 99 NY2d at 302; see e.g. 6 NYCRR 622.18[c] [where a stipulation is reached on all charges, the hearing will be canceled and no further action of the Commissioner will be required]).

Stipulations of counsel are construed as independent contracts subject to settled principles of contract interpretation (see McCoy, 99 NY2d at 302). When interpreting stipulations of counsel, the fundamental objective is to determine the parties' intent from the language they have employed, and to fulfill their reasonable expectations (see U.S. Bank Natl. Assn., 139 AD3d at 1043).

Applying these principles to the stipulations at issue, it is apparent from Department staff's letters and emails that the parties intended to stay respondents' time to answer pending on-going and voluntary settlement discussions. Nothing in the correspondence exchanged between Department staff and the Joglo respondent evinces Department staff's agreement to limit its ability to withdraw from those voluntary negotiations. Although the Joglo respondents point to Mr. Bogin's "understanding" as expressed in his November 2, 2016 email,

Department staff did not expressly confirm that understanding or give a clear indication that it waived its right to withdraw from settlement discussions until after it reviewed the engineering analysis.

Given that settlement discussions are voluntary, it is beyond the reasonable expectations of the parties that one party's willingness to review a document prepared as an aid to negotiations would constitute a waiver of that party's right to withdraw from negotiations if the circumstances warranted. I agree with Department staff that an agreement to curtail its authority to discontinue voluntary settlement discussions pending review of a document offered as part of the negotiations would be a material term that would have to be explicitly addressed and expressly agreed to by staff. Because the stipulation as described by the Joglo respondents was never agreed to by the Department, respondents' motion to enforce the purported stipulation should be denied.

III. Ruling

Respondents' motion to enforce the stipulation as described in their motion papers is denied.

The stay of the Joglo respondents' time to answer the July 2014 complaint is hereby lifted. The Joglo respondent have five (5) days, or until close of business, Tuesday, June 21, 2016, to serve and file an answer in this proceeding.

As previously noticed by Department staff, all respondents are hereby directed to appear before Administrative Law Judge D. Scott Bassinson at the pre-hearing conference scheduled for 10:30 A.M. on Wednesday, June 22, 2016, in a hearing room at the Department's Region 2 headquarters located at One Hunters Point Plaza, 4th Floor, 47-40 21st Street, Long Island City, New York 11101.

Please take notice that the failure to answer or appear at the pre-hearing conference shall constitute a default and a waiver of respondents' right to a hearing.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: June 16, 2016
Albany, New York