

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

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In the Matter of the Alleged Violations of Articles 15 and
25 of the Environmental Conservation Law and Parts 608
and 661 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York

**RULING
ON MOTION FOR
DEFAULT JUDGMENT**

-by-

**NYSDEC File Nos.
R2-20070126-385 and
R2-20141114-544**

DAVID VAKNIN AND OREN VAKNIN,

Respondents.

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Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Jessica Albin of counsel), for staff of the Department of Environmental Conservation.
- No appearance for respondents.

This matter involves allegations by staff of the Department of Environmental Conservation (“Department”) that respondents David Vaknin and Oren Vaknin violated articles 15 and 25 of the Environmental Conservation Law (“ECL”) and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) parts 608 and 661 by constructing 620 square feet of overwater dock above, and 660 feet of floating docks in Shell Bank Creek, a mapped tidal wetland and navigable water of the State, as of October 12, 2007, and by constructing or installing an additional 240 feet of floating docks and two jet ski floats in Shell Bank Creek as of September 9, 2014.

Department staff moves for a default judgment and order of the Commissioner relating to the alleged violations and imposing a civil penalty in the amount of \$65,000 jointly and severally against respondents. For the reasons discussed below, the motion is denied without prejudice.

Procedural History

At issue in this proceeding are certain improvements to residential properties located at 10 Gotham Avenue, Brooklyn, NY 11229 and 12 Gotham Avenue, Brooklyn, NY 11229 (the “Site”). Respondent David Vaknin was the owner of 10 Gotham Avenue from on or about

November 7, 2005 (see Jessica Albin Affirmation [Albin Affirm], Exh C [deed 10 Gotham Avenue]). David Vaknin was also the owner of 12 Gotham Avenue, Brooklyn, NY 11229 from on or about November 7, 2005 (see id. [deed for 12 Gotham Avenue]). On January 19, 2016, David Vaknin sold both properties to Enterprises DM LLC (id., Exh D [referencing the premises as 10-12 Gotham Avenue]). Oren Vaknin is not named on the deeds.

On September 26, 2007, respondent Oren Vaknin submitted a joint application for permit dated September 25, 2007 to install a boat lift at 12 Gotham Avenue, Brooklyn, NY 11229, in Shell Bank Creek (Walker Aff ¶ 5; Exh E). He signed the application as the property owner, although he was not named on the deed (see id.).

On October 12, 2007, staff inspected the Site and discovered structures had been constructed and installed above Shell Bank Creek without a Department permit (id. ¶ 7). Shell Bank Creek is a mapped tidal wetland and navigable water of the State (see id. ¶ 6). On September 9, 2014, staff inspected the Site and found that additional structures had been constructed or installed in Shell Bank Creek without a Department permit (see Garnsey Aff).

An affidavit submitted by Environmental Conservation Officer (ECO) Kimberly Garnsey states that she attempted to personally serve respondents with a notice of hearing and complaint at 12 Gotham Avenue, Brooklyn, New York on August 25, August 31, and September 4, 2015 (Garnsey Aff ¶ 6). Each attempt failed.

A notice of hearing and complaint dated September 22, 2015 is attached to the Albin Affirmation (Albin Affirm, Exh A). The complaint sets forth four causes of action involving alleged violations of ECL articles 15 and 25 and 6 NYCRR parts 608 and 661 related to the construction or installation of structures within and above Shell Bank Creek.¹

On September 22, 2015, Regina Santos Seetahal mailed respondent Oren Vaknin a notice of hearing and complaint by certified mail, return receipt requested, at 12 Gotham Avenue, Brooklyn, NY 11229 (see Albin Affirm ¶ 23, Exh K [affidavit of service of Regina Santos Seetahal]). The same day, Grace Nam mailed respondent David Vaknin a notice of hearing and complaint by certified mail, return receipt requested, at 12 Gotham Avenue, Brooklyn, NY

¹ The four causes of action alleged in the September 22, 2015 complaint are as follows: (1) constructing or installing a six hundred twenty (620) square foot overwater dock in a regulated tidal wetland and navigable water of the State without a permit in violation of ECL §§ 15-1503, 15-1505, and 25-0401, and 6 NYCRR 608.4, 608.5, 661.5(b)(49), and 661.8; (2) constructing or installing six hundred sixty (660) square feet of floating docks in a regulated tidal wetland and navigable water of the State without a permit in violation of ECL §§ 15-1503 and 25-0401 and 6 NYCRR 608.4, 661.5(b)(17) and 661.8; (3) constructing or installing two hundred forty (240) square feet of floating docks in a regulated tidal wetland and navigable water of the State without a permit in violation of ECL §§ 15-1503 and 25-0401, 6 NYCRR 608.4, 661.5(b)(17) and 661.8; and (4) constructing or installing two jet ski floats in a regulated tidal wetland and navigable water of the State without a permit in violation of ECL §§ 15-1503 and 25-0401 and 6 NYCRR 608.4, 661.5(b)(17) and 661.8 (see Albin Affirm, Exh A).

12299 (see Albin Affirm ¶ 23, Exh K [affidavit of service of Regina Santos Seetahal]). Both envelopes were returned to the Department stamped by the U.S. Postal Service as “Return to Sender/Attempted-Not Known/Unable to Forward” (id., Exh L).

ECO Garnsey taped a notice of hearing and complaint on the door of 12 Gotham Avenue, Brooklyn, New York on April 12, 2016 (see Garnsey Aff ¶ 7). The same day, Ms. Albin mailed a notice of hearing and complaint to that address via first class mail (Albin Affirm ¶ 24).

Respondent Oren Vaknin contacted the Department on April 13, 2016 regarding a complaint and appeared at the prehearing conference on May 11, 2016. Respondent David Vaknin did not appear at the prehearing conference (see id., Exh O).

On October 23, 2016, ECO Evan McFee personally served respondent Oren Vaknin with the notice of motion for a default judgment and order along with the affidavit of Andrew Walker in support of motion for default judgment and order; the affidavit of Kimberly Garnsey in support of default judgment and order; the affidavit of Justin Falls in support of motion for default judgment and order; and Exhibit A by delivering a copy thereof to him at 12 Gotham Avenue, Brooklyn, NY 11229 (McFee Aff).

Department staff filed the motion for a default judgment and order with the Department’s Office of Hearings and Mediation Services on October 14, 2016, and the matter was assigned to the undersigned.

Discussion

A motion for a default judgment must include the following: (1) proof of service upon the respondent of the notice of hearing and complaint; (2) proof of the respondent’s failure to appear or failure to file a timely answer; and (3) a proposed order (6 NYCRR 622.15[b][1]-[3]). In this proceeding, staff has not established the threshold element of proof of service of the notice of hearing and complaint upon respondents. Consequently, I deny staff’s motion without prejudice without reaching the merits of the motion.

1. Service of the Notice of Hearing and Complaint

In the first instance, staff has failed to establish that respondents were properly served with the notice of hearing and complaint in accordance with 6 NYCRR 622.3 and CPLR 308.

Service of the notice of hearing and complaint must be made by personal service consistent with the CPLR or by certified mail (see 6 NYCRR 622.3[a][3]). Pursuant to the CPLR, service can be made by delivering the summons to the person to be served (see CPLR

308[1]), or delivering the summons to a person of suitable age and discretion at the actual place of business dwelling or usual place of abode and by either mailing the summons to the person at his or her last known residence or mailing the summons by first class mail to the person's actual place of business (see CPLR 308[2]). If service cannot be accomplished by one of these means after diligent efforts, the use of substitute service as described in CPLR 308(4) is authorized (see CPLR 308[4]).

Staff made four attempts to serve respondents with the notice of hearing and complaint, including three attempts at personal service pursuant to CPLR 308(2) and one attempt by certified mail pursuant to 6 NYCRR 622.3(a)(3). ECO Garnsey attempted to personally serve respondents with a notice of hearing and complaint at 12 Gotham Avenue, Brooklyn, New York on August 25, August 31, and September 4, 2015 (Garnsey Aff ¶ 6). On September 22, 2015, Region 2 secretary Regina Santos Seetahal attempted to serve respondent Oren Vaknin with a notice of hearing and complaint and supporting papers by certified mail, return receipt requested, at 12 Gotham Avenue, Brooklyn, NY 11229 (see Albin Affirm ¶ 23, Exh K [Regina Santos Seetahal affidavit of service]). That same day attorney Grace Nam attempted to serve respondent David Vaknin with a notice of hearing and complaint and supporting papers by certified mail, return receipt requested, at 12 Gotham Avenue, Brooklyn, NY 11229 (see Albin Affirm ¶ 23, Exh K [affirmation of service of Grace Nam]). Each of ECO Garnsey's three attempts at service failed and both envelopes mailed by certified mail on September 22, 2015, were returned to the Department stamped by the U.S. Postal Service as "Return to Sender/Attempted-Not Known/Unable to Forward" (id., Exh L). After these failed attempts, staff proceeded to serve both respondents at 12 Gotham Avenue pursuant to the so-called nail and mail method set forth in CPLR 308(4).

A prerequisite to utilizing the nail and mail method of service under CPLR 308(4) is that diligent efforts were made to serve respondents under CPLR 308(1), 308(2) or 308(3). To determine whether staff's efforts to serve respondents by one of the preferred methods in CPLR 308 were diligent, staff must provide proof of what documents staff attempted to serve. The only notice of hearing and complaint included with staff's motion papers is dated September 22, 2015 and attached to the affirmation of Jessica Albin as Exhibit A. Ms. Albin did not attempt to personally serve respondents pursuant to CPLR 308(2), and her affirmation does not indicate what notice of hearing and complaint was utilized by ECO Garnsey, Ms. Seetahal, or Ms. Nam (see Albin Affirm, Exh A and Exh L, and Garnsey Aff). Notably, each of ECO Garnsey's three attempts to serve personally respondents predates the September 22, 2015 date of the notice of hearing and complaint included in staff's motion papers. Staff has not clarified whether the notice of hearing and complaint ECO Garnsey attempted to serve was the same document, or essentially the same document, that staff mailed on September 22, 2015, and the same notice of hearing and complaint that was served by "nail and mail" on April 12, 2016.

2. Proof of Personal Service on Respondent David Vaknin

Staff has also failed to establish that 12 Gotham Avenue was a permissible location at which to serve respondent David Vaknin under either CPLR 308(2) or 308(4). The only permissible locations where personal service may be made under CPLR 308(2) are a person's dwelling place, usual abode, actual place of business, if service is made in person (and not on the person directly), with follow up service by mail to the person's actual place of business or last known residence. CPLR 308(4) provides that where personal service cannot be made with due diligence under one of the preferred methods, CPLR 308(4) may be utilized. CPLR 308(4) requires that the summons be affixed to the door of either the actual place of business, dwelling place or usual place of abode and mailed to the person at his or her last known residence or mailed by first class mail to his or her actual place of business (see CPLR 308[4]). The Court of Appeals has strictly construed CPLR 308(4) with respect to where service must be affixed and has held that it must occur either at the person's actual place of business or the actual dwelling place (or usual place of abode) (see *Feinstein v Vergner*, 48 NY2d 234 [1978] [process server's attempt to serve defendant by taping the documents at his last known residence, which was his parents' residence and not his current address, was defective and did not establish personal jurisdiction]).

Staff's only allegation with respect to 12 Gotham Avenue insofar as David Vaknin is concerned is that "David Vaknin is and was at all pertinent times the owner of residential property with a mailing address of 12 Gotham Avenue, Brooklyn, New York 11229" (Exh A ¶5). This allegation is insufficient to demonstrate that 12 Gotham Avenue meets one the statutory prerequisites for service of process under either CPLR 308(2), i.e., that this address constitutes David Vaknin's dwelling place, usual place of abode, last known address, or actual place of business, or that the address is an appropriate location where service may be affixed pursuant to CPLR 308(4). Thus, staff has failed to provide proof of personal service on respondent David Vaknin.

3. Proof of Service of Motion for Default Judgment and Order

On a motion for default judgment and order, staff must provide proof of service of the motion upon the respondent (see *Matter of Dudley*, Decision and Order of the Commissioner, July 24, 2009, at 1-2). Staff has not submitted proof of service of the motion upon respondent David Vaknin.

On November 17, 2016, staff provided an affidavit of service from ECO Evan McFee who attested that he personally served respondent Oren Vaknin on October 23, 2016 with the notice of motion for a default judgment and order along with the supporting staff affidavits and exhibits by delivering a copy thereof to him at 12 Gotham

Avenue, Brooklyn, NY 11229 (see Mc Fee Aff). As discussed above, however, staff must, in the first instance, submit adequate proof of service of the notice of hearing and complaint on respondent Oren Vaknin.

4. Proof of Violations

Although I am not ruling on the merits of staff's motion for default judgment, I note that the violations alleged in the motion and the notice of hearing and complaint have occurred at two distinct properties, namely 10 and 12 Gotham Avenue (see Exh C [separate deeds for 10 and 12 Gotham Avenue]). The only allegation in the complaint linking respondent Oren Vaknin to 10 Gotham Avenue is that upon information and belief he resided there (see Albin Affirm, Exh. A ¶ 6). Staff does not provide evidence to support this allegation nor assert any other connection by Oren Vaknin to the property. Thus, even assuming staff proved it obtained personal jurisdiction over respondent Oren Vaknin, which it has not, staff has provided insufficient proof to establish his liability for any violations allegedly occurring at the 10 Gotham Avenue site (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, Dec. 12, 2013, at 2-3).

Staff's motion for a default judgment is denied without prejudice.

/s/

Lisa A. Wilkinson
Administrative Law Judge

Dated: Albany, New York
November 29, 2016

APPENDIX A

1. Notice of motion and motion for default judgment and order dated October 14, 2016;
2. Affirmation of Jessica Albin, Esq. dated October 14, 2016 attaching:
 - a. notice of hearing and complaint (Exhibit A)
 - b. proof of service (Exhibit B)
 - c. 2005 property deeds for 10 and 12 Gotham Avenue Brooklyn, NY (Exhibit C)
 - d. 2016 property deeds for 10 Gotham Avenue Brooklyn, NY(Exhibit D)
 - e. 2014 notice of violation (Exhibit J)
 - f. affirmations of Service (Exhibit K)
 - g. certified mail receipts (Exhibit L)
 - h. email communication from J. Albin to O. Vaknin dated and receipt dated April 13, 2016 (Exhibit N)
 - i. meeting roster dated August 11, 2016 (Exhibit O)
 - j. Proposed order (Exhibit P)
3. Affidavit of Andrew Walker, sworn to September 20, 2016, attaching:
 - a. joint application for permit (Exhibit E)
 - b. photographs (Exhibit F)
 - c. notice of violation dated November 7, 2007 (Exhibit G)
 - d. meeting roster dated November 28, 2007 (Exhibit H);
4. Affidavit of Kimberly Garnsey dated September 27, 2016 attaching:
 - a. photographs (Exhibit I)
 - b. photographs of 10-12 Gotham Avenue, Brooklyn, New York 11229 (the "Site") showing U-shaped floating dock with approximately eleven (11) jet skis, some on the jet ski floats and some on the floating dock and a hot tub and jet skis on the overwater dock, and a photograph showing the notice of hearing and complaint affixed to the door (Exhibit M); and
5. Affidavit of Justin Falls dated September 8, 2016.
6. Affidavit of Evan McFee dated October 23, 2016.