

In the Matter of Alleged Violations of
article 24 of the Environmental Conservation
Law (ECL) and part 663 of title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York (6 NYCRR part 663)
by

RULING ON
MOTION TO DISMISS

DEC Case Nos.
R2-20011119-223
and R2-0179-96-02

ANTHONY VENDITTI, KATHY VENDITTI,
TINA SANJOUR GOUGH, PETER L. WOHLER
and CLAUDIA SANJOUR,

Respondents.

June 15, 2004

Background

The complaint in this matter, dated March 3, 2003, alleges that Respondents violated 6 NYCRR 663.4 by removing vegetation, causing or allowing the deposition of wood chips and filling with wood chips, causing or allowing grading, and causing or allowing the placement of soil in or adjacent to a regulated freshwater wetland at a site in Staten Island, all without approval of the Department of Environmental Conservation (Department or DEC).

An answer to the complaint was submitted on behalf of Respondents Anthony Venditti and Kathy Venditti (the Vendittis), two of the five Respondents, by the law firm of Menicucci, Villa & Associates PLLC. The answer is dated March 20, 2003. The record concerning the present motion does not include an answer on behalf of the other Respondents, although an answer or answers may have been provided to DEC Staff.

On January 27, 2004, Richard A. Rosenzweig, Esq. submitted a motion to dismiss on behalf of the Vendittis. The motion was filed with the DEC Office of Hearings and Mediation Services (OHMS) and was assigned to Administrative Law Judge (ALJ) Molly T. McBride. A statement of readiness, pursuant to 6 NYCRR 622.9, has not yet been filed in this case.

On February 2, 2004, David S. Rubinton, Esq., Assistant Regional Attorney in the DEC Region 2 Office, notified Chief Administrative Law Judge James T. McClymonds that he and Mr. Rosenzweig had agreed that DEC Staff would have an additional 21 days to respond to the motion. In late February 2004, Mr. Rubinton and Mr. Rosenzweig notified ALJ McBride that they were considering settling the case and requested an adjournment. Following additional correspondence, Mr. Rubinton and Mr. Rosenzweig agreed to May 19, 2004 as the date for DEC Staff to submit its reply to the motion, since a settlement had not been reached.

DEC Staff's reply to the motion was submitted to the DEC OHMS on May 19, 2004. The matter was reassigned to ALJ Susan J. DuBois (the undersigned). On May 21, 2004, Mr.

Rosenzweig sent a letter to Mr. Rubinton, with copies to Chief ALJ McClymonds and ALJ McBride. The letter proposed that the ALJ wait a week before deciding the motion since, based on Mr. Rosenzweig's interpretation of DEC Staff's reply papers, the Vendittis might be willing to settle the matter.

On May 21, 2004, I notified the parties that the case had been reassigned to me and asked that DEC Staff notify me if it was willing to agree to postpone the decision on the motion. In a letter dated May 21, 2004, Mr. Rubinton disagreed with Mr. Rosenzweig's characterization of what remained in dispute, but stated that DEC Staff would be willing to consider any reasonable settlement proposal. Mr. Rubinton also stated that he would be leaving the Department as of May 26, 2004 and that further contact regarding the case should be to Regional Attorney Louis Oliva, Esq. Mr. Rosenzweig replied on May 24, 2004, stating that he apparently misunderstood DEC Staff's May 19 reply, and that the motion could be decided.

Motion to Dismiss and DEC Staff Reply

The notice of motion asks that all violations and complaints against the Vendittis and with respect to the real property at lots 47, 57 and 58 of Block 2280 be dismissed. The affirmation in support of the motion, however, asks that "the violations and complaint should be dismissed as a matter of law, and/or summary judgement granted to the Vendittis," without reference to particular lots. The complaint concerns: (a) an inspection in late 1995 and a "violation" issued in 1996 concerning grading and filling with wood chips on lots 47, 51, and 53, and (b) observations in 2001 that lots 45, 47, 51, 53, 55 and 57 had been cleared and filled with soil. I am considering the motion to dismiss as requesting that any or all of the allegations against the Vendittis, with regard to any of the lots, be dismissed.

In support of the motion, the Vendittis submitted an affirmation to which are attached the complaint, their answer, and an affidavit by Mr. Venditti with nine exhibits. The affirmation states that the alleged violations existed prior to the Vendittis' ownership of the subject properties, the last of which they purchased in October 2000, and that no violations occurred on lot 47. The affirmation asserts the Vendittis did none of the alleged violations. The affirmation states that no questions of fact exist, and asks that the complaint be dismissed as a matter of law and/or summary judgement be granted to the Vendittis. Mr. Venditti's affidavit also states that the complaint should be dismissed since the Vendittis had not been afforded the opportunity for a hearing within a reasonable time and that the site is no longer an actual wetland.

DEC Staff's response to the motion consists of an affirmation by Mr. Rubinton and an affidavit by Joseph Pane, Principal Fish and Wildlife Biologist for DEC Region 2. Mr. Rubinton's affirmation states that no question of fact exists in that Mr. Venditti "admitted in his affidavit that he filled the subject lots with a foot of soil (affidavit at paragraph 11)." Mr. Pane's affidavit states that he confirmed the existence of a wetland on the site in 1993, and that during his April 9, 2001 inspection of the site he discovered that the property had been recently cleared and filled with soil without a permit for this activity.

Discussion

Pursuant to 6 NYCRR 622.11(b)(3), the party making a motion bears the burden of proof on that motion. Part 622 does not specifically discuss motions to dismiss but does contain a section on motions for orders without hearing, which provides that such motions must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing (6 NYCRR 622.12(e)). The Venditti's motion to dismiss seeks relief in the nature of a motion for an order without hearing and will be treated as such. However, in the present case, disputed facts exist relevant to the Vendittis' liability for both sets of alleged violations and, thus, the motion must be denied.

With regard to the Vendittis' ownership of the site or parts of it, Mr. Venditti's affidavit contains assertions about having purchased the lots on dates ranging from February 1995 to October 2000. The answer submitted on behalf of the Vendittis, however, admits the allegations contained in paragraph 3 of the complaint. This paragraph states, "Upon information and belief, at all times relevant hereto, Anthony Venditti and Kathy Venditti (hereinafter "Respondent Vendittis") are the owners of Tax Block 2280, Lots 45, 47, 51, 53, 55, 57 and 58, in Staten Island, New York." The Vendittis are bound by the admission contained in their answer and their ownership is established as a matter of law.¹

The complaint alleges that a DEC Biologist inspected the site on December 6, 1995 and that a violation, presumably a notice or letter regarding alleged violations, was issued on February 13, 1996 (complaint, paragraphs 7 and 8). Exhibit A of Mr. Venditti's affidavit is a February 13, 1996 letter from the DEC Division of Fish and Wildlife to Tina Sanjour concerning alleged violations on lots 47, 51 and 53. Mr. Venditti's affidavit states that "there was an[d] is no fill or wood chips on lot 47 at any time." Thus, a factual issue is in dispute between the parties with respect to lot 47. With regard to lots 51 and 53, Mr. Venditti's affidavit relies on not having owned the lots at the time of the alleged violation, a statement conflicting with the admission in the Venditti's answer as noted above, and on the statement that the Vendittis "were not named in the violation in 1996," which is not a basis for dismissing the present complaint.

With regard to the April 6, 2001 observations of clearing and filling, Mr. Venditti's affidavit states that he and his wife had no knowledge of, and did not participate in, the clearing and filling that the DEC alleges occurred on lots 45, 47, 51, 53, 55 and 57. The affidavit states that the only activity they were involved in was filling ruts where two debris trailers had been

¹ Even if they were to move successfully to amend the answer with regard to ownership of the lots, and the motion were granted, that would at most raise fact issues concerning ownership (*Levy v Delaware, Lackawanna & Western Railroad Co.*, 211 AD 503, 207 NYS 592 [4th Dept, 1925]). They still would not be entitled to an order dismissing the complaint without a hearing.

sitting on the site for a day or two, with soil about a foot deep in an area about 30 feet by 20 feet (Venditti affidavit, paragraph 11).

These assertions do not support granting summary judgment dismissing the complaint with regard to the Vendittis and the alleged violations in 2001 because factual disputes exist concerning these violations. Mr. Pane's affidavit states that he inspected the site on April 9, 2001 and discovered that "the property had been recently cleared and filled with soil" (Pane Affidavit, paragraph 4). Disputed issues of fact exist with regard to whether these alleged violations occurred and whether the Vendittis were liable for them. Contrary to Mr. Rubinton's assertion that Mr. Venditti "admitted in his affidavit that he filled the subject lots with a foot of soil," the extent of the fill is in dispute.

Ruling: The motion to dismiss is denied.

Further proceedings

A hearing will be scheduled after DEC Staff files a statement of readiness for hearing. I am requesting that Mr. Oliva notify Mr. Rosenzweig and me whether Mr. Oliva or another attorney will be representing DEC Staff in this matter, now that Mr. Rubinton is no longer working for the DEC. I also request that Mr. Oliva notify me if the matter is settled without a hearing.

Albany, New York
June 15, 2004

_____/s/_____
Susan J. DuBois
Administrative Law Judge

TO: Louis Oliva, Esq.
Richard A. Rosenzweig, Esq.