

**NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

---

In the Matter of the Alleged Violations of Articles 27 of the Environmental Conservation Law (ECL) of the State of New York and Section 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING**

by

**WASTE AWAY CARTING NY, INC., WASTE AWAY CARTING INC., and BEN PICCOLO individually and as operator of Waste Away Carting NY, Inc. and/or Waste Away Carting Inc.,**

DEC Case No.  
R1-20170720-198

---

Respondents.

---

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (David S. Rubinton of counsel), for staff of the Department of Environmental Conservation
  
- Genevieve Lane LoPresti, Esq., for respondents Waste Away Carting NY, Inc. and Ben Piccolo

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondents Waste Away Carting NY, Inc. (Waste Away NY), Waste Away Carting Inc. (Waste Away), Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. and Mica Realty and Construction Corp (Mica) with: (i) disposing of solid waste material without a permit in violation of former 6 NYCRR 360-1.5(a); and (ii) receiving and storing solid waste material, specifically, construction and demolition (C&D) debris in violation of ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i), at property owned by respondent Mica and operated by respondents Waste Away NY, Waste Away and Piccolo located at 899 Long Island Avenue, Deer Park, New York (site or facility).<sup>1</sup>

By notice of motion dated September 16, 2018, respondents Waste Away NY and Piccolo (respondents) moved “for an order (1) dismissing the proceeding on the basis that there was an illegal entry upon the subject premises without an administrative search warrant, excluding and suppressing the evidence obtained from the warrantless illegal entry and search and seizure of evidence; (2) pursuant to CPLR 3126, an order of preclusion as discovery still has

---

<sup>1</sup> The solid waste management facility regulations, 6 NYCRR part 360, were repealed and replaced by 6 NYCRR parts 360 – 366 and 369, effective November 4, 2017. The violations stated in the complaint allegedly occurred on May 31, 2017. Accordingly, the former 6 NYCRR part 360 and its subparts are applicable to this matter.

not been provided; (3) pursuant to CPLR 3020, directing that the discovery be provided as the discovery that has been provided is insufficient to permit the Respondent to properly proceed to trial; (4) dismissing the complaint as it fails to state a sufficient cause of action; (5) for attorneys [sic] fees, costs and disbursements incurred in the making of the instant motion; and (6) for such other related relief.”

In support of respondents’ motion, respondents submitted the affirmation of good faith of Genevieve Lane LoPresti, Esq. (LoPresti good faith affirmation), dated September 16, 2018; the affirmation of Genevieve Lane LoPresti, Esq. (LoPresti affirmation), dated September 16, 2018, with three exhibits attached; and the affidavit of Ben Piccolo (Piccolo affidavit), sworn to September 16, 2018. Department staff opposed the motion through the affirmation of David S. Rubinton (Rubinton affirmation), dated October 23, 2018 and the affidavit of Christopher Spies (Spies Affidavit), sworn to October 18, 2018. *See* Appendix A attached hereto.

By amended notice of motion dated October 16, 2018, respondents, in addition to the relief requested in the September 16, 2018 motion, requested an order “dismissing the complaint as and for the failure to obtain jurisdiction of the person of the defendant.”

### **PROCEEDINGS**

Department staff’s August 3, 2017 complaint alleges two causes of action against respondents related to C&D debris that had been collected elsewhere, brought to the site and stockpiled there (*see* Lopresti Affirmation, Exhibit 1, Complaint ¶ 16). The first cause of action alleges respondents disposed solid waste at the site in violation of former 6 NYCRR 360-1.5(a) (*see id.* ¶ 23). The second cause of action alleges that respondents received and stored solid waste material at the facility without a permit in violation of ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i) (*see id.* ¶ 25). Department staff seeks an order finding respondent in violation of the ECL and former 6 NYCRR part 360 as described above; enjoining respondents from any further actions causing such violations to continue; directing respondents to pay a civil penalty to the fullest extent allowed by statute; and for such other relief as the Commissioner may deem just, proper and appropriate (*see id.*, Complaint, Wherefore clause).

Respondent Mica reached settlement with the Department through an order on consent (*see* Rubinton affirmation ¶ 2). Respondents Waste Away NY and Piccolo filed an answer to complaint dated June 11, 2018, containing, in addition to denials, twenty-one affirmative defenses and various cross claims against respondent Mica.

## DISCUSSION

### 1. Respondents' motion to dismiss based on illegal entry

Respondents claim that Department staff entered the facility without the consent or the permission of the respondents and without an administrative search warrant. Mr. Piccolo claims in his affidavit that he was not present at the facility on the date, May 31, 2017, that Department staff claims he granted staff site access (*see* Piccolo affidavit ¶¶ 4, 5). Staff's complaint alleges Mr. Piccolo granted staff access (*see* LoPresti affirmation, Exhibit A, Complaint ¶ 14).

In response to respondents' motion, Department staff aver that staff arrived at 899 Long Island Avenue, Deer Park, New York at 10:50 a.m. on May 31, 2017 along with employees from the Town of Babylon (*see* Spies affidavit ¶ 5). Department staff requested access from an employee working at the site who provided a Town employee with a telephone number to call the boss (*id.* ¶ 10). According to Mr. Spies, Environmental Conservation Officer Christopher DeRose placed a call to the number provided and access was granted by Ben Piccolo, who provided a copy of his driver's license to the ECO upon his arrival at approximately 11:50 a.m. (*id.* ¶ 10). Thereafter, Department staff inspected the site with Mr. Piccolo (*id.* ¶ 11). According to staff, Mr. Piccolo did not express any objection to the Department's presence during the inspection (*id.* ¶ 12).

On this motion to dismiss the complaint, I accept the facts as alleged in the complaint as true and accord the Department every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1997]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The facts alleged in the complaint are supported by the affidavit of Mr. Spies.

Because respondents and Department staff have different recollections of the events leading up to and including the Department's inspection of the premises, there are facts that require further development at hearing. Accordingly, respondents' motion to dismiss based on illegal entry without an administrative search warrant is denied.

Respondents also argue that due to the Department's illegal search and seizure of evidence that the Department is precluded from all use of the evidence obtained and the introduction of the evidence at trial. Department staff argues that because there was no illegal entry exclusion or suppression of evidence should not be considered.

For the reasons stated above, respondents' motion to preclude or suppress evidence is denied. The parties will be allowed to fully develop a record at hearing regarding the circumstances surrounding Department staff's inspection of the premises. Respondents will have the opportunity to make any objections about Department staff witnesses' testimony and any evidence proffered in connection with that testimony.

2. Respondents' request for an order of preclusion because discovery has not been provided

Respondents seek an order of preclusion because, as of the date of the motion, Department staff had not provided a response to respondents' discovery demands. Department staff responded to the discovery demands on August 20, 2018 by sending respondents' attorney a USB device containing documents responsive to the demands (*see* LoPresti Affirmation, Exhibit C). On September 14, 2018, respondents claimed they did not receive the USB device (*id.*). After the filing of respondents' motion, staff confirms that Ms. LoPresti picked up the USB device at the Department's Region 1 offices (*see* Rubinton Affirmation ¶ 4).

Accordingly, respondents' motion for an order of preclusion is denied.

3. Respondents' motion to compel discovery

Respondents' motion to compel discovery is denied for the reasons stated above. Respondents also claim that "Petitioner was never deposed." Pursuant to 6 NYCRR 622.7(b)(2), depositions will only be allowed with permission of the ALJ upon a finding that they are likely to expedite the proceeding. Based on the record before me, I find it unlikely that depositions would expedite the proceeding.

4. Respondents' motion to dismiss the complaint because it fails to state a sufficient cause of action

Respondents claim that the complaint should be dismissed as it fails to state a cause of action and contains duplicative charges and violations. In response, staff asserts that the complaint speaks for itself.

In reviewing respondents' motions to dismiss based on a failure to state a cause of action, the material facts alleged in the complaint and in any submissions in opposition to the motion to dismiss are accepted as true, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1997]; CPLR 3211; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). "Moreover, Department Staff must be accorded 'the benefit of every possible favorable inference.'" (*Matter of Town of Virgil*, ALJ Ruling, June 25, 2008 at 4 [quoting *Sokoloff*, at 414]). The question is whether the complainant actually has a cause of action, not whether the complainant has properly stated one (*see Leon*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Where, as here, the movant has submitted affidavits in support of the motion, the motion may be granted upon those affidavits only if they "establish conclusively" that the complainant has no valid cause of action to pursue (*see Rovello*, 40 NY2d at 636; *see also Godfrey v Spano*, 13 NY3d 358, 374 [2009]; *Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Matter of Town of Virgil*, at 4). If the affidavits do not "establish conclusively" that no viable cause of action exists, consideration of respondent's evidence is permissible only if the motion to dismiss is converted to a motion for summary judgment (*see Rovello*, 40 NY2d at 636).

Here, respondent's submissions do not conclusively establish that Department staff does not have a viable cause of action against respondents. In its complaint, Department staff alleges for a first cause of action that respondents disposed of solid waste material at the site without a permit in violation of former 6 NYCRR 360-1.5(a). Former subdivision 360-1.5(a) provides “no person shall dispose of solid waste in the State” except at a disposal facility exempt from part 360 or a disposal facility authorized by the Department to accept such waste for disposal. “A material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked, or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water” (*see* former 6 NYCRR 360-1.2[a][4]). Staff’s complaint further alleges that C& D debris that had been collected elsewhere was brought to the site and deposited there.

Here, Department staff’s complaint alleges sufficient facts to state a claim that respondents disposed of solid waste materials at the site without a permit.

For a second cause of action, staff alleges that respondent, by receiving and storing solid waste material at the facility in the form of C&D debris, violated ECL 27-0707 and former 6 NYCRR 360-1.7(a)(1)(i). ECL 27-0707(1) reads, in relevant part, that “no person shall commence operation, including site preparation and construction, of a new solid waste management facility until such person has obtained a permit pursuant to this title.” The regulations implemented pursuant to ECL 27-0707(2) similarly provide, unless otherwise exempt from permitting pursuant to former part 360, that “no person shall: (i) construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part” (*see* former 6 NYCRR 360-1.7[a][1][i]).

Respondents also argue that the violations alleged in the second cause of action are duplicative because two sections of law charge the same violation and the charges should be dismissed. Whether a cause of action or violation alleged in a complaint is duplicative or multiplicative is not considered when determining whether the complaint states a claim (*see e.g. Matter of Smith*, Order of the Commissioner, July 2, 2015 at 2).

Department staff’s complaint alleges sufficient facts to state a claim that respondents received and stored solid waste material at the site without a permit. Accordingly, respondents motion to dismiss the complaint because it fails to state a sufficient cause of action is denied.

5. Respondents’ request for attorney’s fees, cost and disbursements incurred in making the instant motion

Respondent has cited no authority for the awarding of fees, costs and disbursements in an administrative enforcement proceeding. Furthermore, it is not within the powers of an ALJ to grant such relief (*see e.g.* 6 NYCRR 622.10[b][1]). Accordingly, respondents’ request for attorney’s fees, cost and disbursements is denied.

6. Respondents' amended notice of motion

Respondents' motions papers argued that respondents were not properly served with the complaint and seek dismissal on jurisdictional grounds, but the original notice of motion does not state the jurisdictional grounds for dismissal. Furthermore, respondents do not seek relief on those grounds in their supporting papers (*see* LoPresti affirmation, Wherefore clause). By amended notice of motion dated October 16, 2018, respondents attempt to cure that omission.

By scheduling order dated July 20, 2018, all motions were required to be served no later than August 31, 2018. On September 6, 2018, at the request of respondents' counsel, I extended the deadline for serving all motions to September 17, 2018 with replies due no later than September 27, 2018. Respondents served the instant motion on September 17, 2018. Department staff's deadline to reply to the motion was extended to October 23, 2017. The amended notice of motion was served on Department staff on October 16, 2018. Department staff served its response to the September 16, 2018 motion on October 23, 2018 without addressing respondents' amended notice of motion.

The deadline for filing motions was September 17, 2018, therefore respondents needed to seek permission to amend the notice of motion. Respondents did not seek permission. In addition, respondents did not amend the relief requested in the LoPresti affirmation to include dismissal on jurisdictional grounds.

Accordingly, I reserve on respondents' motion to dismiss the complaint for failure to obtain jurisdiction of over respondents. Department staff is directed to file affidavits of service of the notice of hearing and complaint on respondents Waste Away Carting NY, Inc. and Ben Piccolo, and provide copies to respondents, within fifteen (15) days of the date of this ruling.

7. Departments staff's request to remove respondent Mica Realty and Construction Corp. from the caption

Department staff settled the matter with respondent Mica Realty and Construction Corp. (Mica) and requests that respondent Mica be removed from the caption and not be copied on further communications in this proceeding (*see* Rubinton Affirmation ¶ 2). Although respondents do not oppose this request, respondents' answer to the complaint includes cross claims against respondent Mica. Accordingly, I review those cross claims to determine whether there would be any prejudice to respondents if Department staff's request is granted and the proceeding against respondent Mica is discontinued.

Respondents' cross claims against respondent Mica are either affirmative defenses identified as cross claims (*see* Lopresti Affirmation, Exhibit B, Answer, ¶¶ Thirty-third and Thirty-Fourth) or are claims for contribution and apportionment of liability (*see id.* ¶¶ Thirty-Fifth, Thirty-Sixth and Thirty-Seventh).

For those cross claims expressing an affirmative defense, respondents are not prevented from proving those affirmative defenses without Mica joined as a party to this proceeding. The cross claims for contribution, apportionment and indemnification, however, are not properly

raised, and cannot be resolved, in this forum (*see Matter of Huntington and Kildare, Inc.*, Ruling of the Chief Administrative Law Judge, November 16, 2016, at 4; *Matter of Universal Waste, Inc.*, Second Interim Decision of the Commissioner, August 16, 1989, at 1). The Department's enforcement hearing regulations do not provide for cross claims or impleaders (*see Matter of Gasco-Merrick Road Gas Corp.*, Ruling of the ALJ, July 21, 2005, at 1). If respondents believe that defense of this administrative proceeding requires examination of Mica Realty and Construction Corp., respondents may subpoena witnesses to appear for testimony, subject to any objections that may be interposed.

In light of the Department's settlement of the matter with respondent Mica, the matter is discontinued against respondent Mica Realty and Construction Corp. Consistent with staff's request, the caption is amended to remove Mica Realty and Construction Corp., and Mica will not be copied on future correspondence, rulings or reports from this office.

### **RULING**

Based on the foregoing discussion, my rulings on the various motions and requests are as follows:

1. A. Respondents' motion to dismiss based on illegal entry without an administrative search warrant is denied.  
  
B. Respondents' motion to preclude or suppress evidence based on illegal entry without an administrative search warrant is denied.
2. Respondents' motion for an order of preclusion is denied.
3. Respondents' motion to compel discovery is denied.
4. Respondents' motion to dismiss the complaint because it fails to state a sufficient cause of action is denied.
5. Respondents' request for attorney's fees, cost and disbursements is denied.
6. I reserve on respondents' motion to dismiss the complaint for failure to obtain jurisdiction over respondents.
7. Department staff's request to remove Mica Realty and Construction Corp. from the caption is granted and the matter against Mica Realty and Construction Corp. is discontinued.

8. Department staff shall file affidavits of service of the notice of hearing and complaint on respondents Waste Away Carting NY, Inc. and Ben Piccolo, and provide copies to respondents, within fifteen (15) days of the date of this ruling.

\_\_\_\_\_  
/s/  
Michael S. Caruso  
Administrative Law Judge

Dated: November 28, 2018  
Albany, New York

## APPENDIX A

*Matter of Waste Away Carting NY, Inc., Waste Away Carting Inc., Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc.*

DEC File No. R1-20170720-198

Motion to Dismiss, Preclude and Compel

### Respondents Waste Away Carting NY, Inc. and Ben Piccolo's papers

1. Notice of Motion to Dismiss, Preclude and Compel, dated September 16, 2018
2. Affirmation of Good Faith of Genevieve Lane LoPresti, dated September 16, 2018
3. Affirmation of Genevieve Lane LoPresti, dated September 16, 2018, attaching Exhibits A, B and C:
  - A. Complaint, dated August 3, 2017
  - B. Answer, Affirmative Defenses, and Cross-Claims, dated June 11, 2018
  - C. Notice to Take Deposition Upon Oral Examination, Witness Demand, and Notice for Discovery and Inspection, all dated August 1, 2018; Correspondence from Genevieve Lane LoPresti to Mr. Rubinton, dated September 14, 2018; Correspondence from David Rubinton to Genevieve Lane LoPresti, dated August 20, 2018; and Affirmation of Service of Notice of Motion and supporting papers, dated September 17, 2018
4. Amended Notice of Motion, dated October 16, 2018, with affirmation of service of Genevieve Lane LoPresti, dated October 18, 2018

### Department staff's papers

1. Affirmation of David S. Rubinton, dated October 23, 2018, with Affidavit of Christopher Spies, sworn to October 18, 2018, attached as Exhibit A