

**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 ON
MOTION TO
WITHDRAW**

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., Waste Away Carting 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. (respondents) 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 a facility operated by respondents Waste Away NY, Waste Away and Piccolo located at 899 Long Island Avenue, Deer Park, New York.¹

By notice of motion dated September 16, 2018, respondents Waste Away NY and Piccolo (respondents) moved to dismiss the proceeding, compel discovery and other relief. By

¹ The solid waste management facility regulations, 6 NYCRR part 360, were repealed and replaced by 6 NYCRR parts 360 – 366 and 369, effective November 4, 2017.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.

ruling dated November 28, 2018, I denied respondents' motion except I reserved on respondents' motion to dismiss based on personal jurisdiction, pending receipt of affidavits of service of the notice of hearing and complaint on respondents Waste Away Carting NY, Inc. and Ben Piccolo. On November 29, 2018, Department staff filed the requested affidavits of service.

The matter was scheduled for hearing on March 5, 2019. On February 13, 2019, Department staff served a motion for order without hearing on respondents' attorney by first class mail (*see* Affidavit of Service of Carol Gajewski, sworn to February 26, 2019). On February 25, 2019, respondents' attorney filed an order to show cause to withdraw as counsel for respondents. The Uniform Enforcement Hearing Procedures (6 NYCRR part 622), however, do not authorize ex parte orders to show cause. Accordingly, by letter dated February 25, 2019, I denied Ms. LoPresti's order to show cause and directed counsel to submit a motion on notice pursuant to 6 NYCRR 622.6(c). I also adjourned the hearing until further notice.

By email dated February 26, 2019, Ms. LoPresti advised me that she had made the motion to withdraw. She also requested an extension of time to respond to staff's motion. Because Ms. LoPresti could not locate staff's motion papers, staff served a courtesy copy on Ms. LoPresti by email dated March 4, 2019. After several extensions agreed to by Department staff, respondents' response to staff's motion was due on May 6, 2019.

On May 1, 2019, Ms. LoPresti filed a notice of motion and supporting papers to withdraw as counsel for respondents Waste Away Carting NY, Inc., Waste Away Carting Inc., and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. Ms. LoPresti also requested: (1) that respondents be allowed thirty (30) days to retain substitute counsel; (2) that staff's motion for order without hearing be held in abeyance pending a decision on her motion to withdraw; and (3) that the motion be sealed from the public and other parties view. The motion to withdraw was served on respondents and Department staff by first class mail (*see* Affirmation of Service of Robert LoPresti, dated May 2, 2019). No responses to the motion to withdraw have been filed. Accordingly, I consider the motion as an unopposed motion.

DISCUSSION

Absent the consent of the client, an attorney may "withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct" (CPLR 321[b][2]). An attorney may end the attorney-client relationship without the consent of the client when there is an irretrievable breakdown in the relationship or a failure of cooperation by the client (*see e.g. Farage v Ehrenberg*, 124 AD3d 159, 165 [2d Dept 2014]).

Ms. Lopresti's supporting papers demonstrate that her relationship with her clients is beyond repair. Accordingly, Ms. LoPresti's motion to withdraw is granted. Her request to provide respondents thirty (30) days to retain new counsel and to adjourn staff's motion,

however, requires further discussion. Although fairness dictates that respondents should be provided time to retain counsel and respond to staff's motion, respondents in this matter were already provided with several extensions to respond to staff's motion, and according to counsel, respondents' lack of cooperation prevented counsel from responding to staff's motion. Additionally, respondents have not objected to Ms. LoPresti's motion to withdraw.

Courts have allowed matters to proceed without the assistance of counsel in matters where the attorney's withdrawal was caused by a voluntary act of the client (*see e.g. Sarlo-Pinzur v Pinzur*, 59 AD3d 607, 608 [2d Dept 2009]). Here, counsel's motion is granted partially because of the clients' failure to cooperate with counsel. Accordingly, there is support for denying counsel's request to stay this proceeding and determining Department staff's motion for order without hearing as an unopposed motion. Staff, however, has not responded to counsel's motion to withdraw or otherwise objected to the relief requested.

The better practice on this unopposed motion is to follow those cases allowing a 30-day stay to enable respondents in this matter to obtain new counsel (*see e.g. Welch Allyn, Inc. v Vail Tool Co., Inc.*, 219 AD2d 824, 825 [4th Dept 1995]). Such an outcome is consistent with CPLR 321(c). Therefore, respondents will be given thirty (30) days to obtain new counsel and advise the undersigned Administrative Law Judge (ALJ) that new counsel has been obtained. If respondents fail to obtain new counsel within the time provided, I will consider staff's motion for an order without hearing as an unopposed motion.

RULING

Based on the foregoing discussion, my ruling on counsel's motion to withdraw is as follows:

1. Genevieve Lane LoPresti's motion to withdraw as attorney for respondents Waste Away Carting NY, Inc., Waste Away Carting Inc., and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. is granted.
2. Department staff's motion for order without hearing and all present and future proceedings in this matter are stayed for a period of thirty (30) days from the date of this ruling.
3. Respondents Waste Away Carting NY, Inc., Waste Away Carting Inc., and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste Away Carting Inc. shall have thirty (30) days from the date of this ruling to obtain new counsel and provide the undersigned ALJ with the new counsel's name and contact information.
4. If respondents Waste Away Carting NY, Inc., Waste Away Carting Inc., and Ben Piccolo, individually and as operator of Waste Away Carting NY, Inc. or Waste

Away Carting Inc. fail to retain new counsel within thirty (30) days of the date of this ruling, Department staff's motion for order without hearing will be considered as an unopposed motion and ruled upon accordingly.

5. Genevieve Lane LoPresti's request that the instant motion be sealed from public and other parties view is granted to the extent allowed by law.

SO ORDERED,

_____/s/
Michael S. Caruso
Administrative Law Judge

Dated: June 26, 2019
Albany, New York