

**STATE OF NEW YORK**  
**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of the New York State Environmental Conservation Law (ECL) Article 17, Navigation Law Article 12, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**RULING**

DEC Case No.  
R4-2018-0918-176

- by -

**WINTER'S RIGGING INC.,**

Respondent.

---

Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Stephen Repsher, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Barclay Damon, LLP (Thomas J. Fucillo of counsel) for respondent

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint upon respondent Winter's Rigging Inc. on November 29, 2018, pursuant to 6 NYCRR 622.3(a)(3) (*see* affidavit of service of Jill Viscusi, sworn to February 26, 2019). The notice of hearing and complaint were received by respondent on December 7, 2018.

The complaint alleges that on August 11, 2018, respondent, while responding to an August 9, 2018 train derailment, and in the act of righting a derailed locomotive engine, caused and is liable for the discharge of diesel fuel which entered Hungry Hollow Creek. By causing the discharge, staff alleges respondent violated Navigation Law § 173, ECL 17-0501(1), 17-0505, 17-0511, 17-0701(1)(a), 17-0803, and 17-0807(4), and 6 NYCRR 750-1.4(a). Department staff requests the imposition of a sixty thousand dollar (\$60,000) civil penalty against respondent.

Respondent did not answer the complaint. On February 26, 2019, Department staff submitted a written motion for default judgment with supporting papers (*see* Appendix A,

attached hereto [listing documents submitted on the motion]). Department staff served the motion and supporting papers on respondent by first class mail on February 26, 2019 (*see* affidavit of service of Jill Viscusi, sworn to February 26, 2019).

By letter dated March 4, 2019, Chief Administrative Law Judge (ALJ) James T. McClymonds advised the parties that the matter had been assigned to the undersigned ALJ. By letter dated March 8, 2019, respondent filed papers in opposition to staff's motion (*see* Appendix A). Respondent argues that respondent should be allowed to file a late answer to the complaint because good cause exists for respondent's default and respondent has a meritorious defense to staff's complaint. Respondent's opposition constitutes a cross-motion to open the default and for leave to file a late answer. Respondent also requests that staff's motion for default judgment be denied.

According to respondent, on August 9, 2018, respondent was dispatched by New York Susquehanna and Western Railroad (NYS&W) to the site of a railroad derailment near the Town of Deposit in Delaware County to right and secure derailed rail cars. Department staff, NYS&W and NYS&W's spill contractor, Environmental Products & Services of Vermont (EPS), were at the scene when respondent arrived. Respondent was advised that the saddle tanks on either side of the downed engine had already been pumped out, but a significant amount of fuel had already been released to the environment. It took several days of clearing other rail cars before respondent could right the derailed engine. (*See* affidavit of Travis J. Winter, sworn to March 7, 2019 [Winter Affidavit], ¶¶ 4-8.)

Due to poor soil stability and the generally hazardous enterprise of lifting an engine weighing 250 tons, respondent claims there was no safe way for NYS&W, EPS or anyone to ensure that there was no remaining diesel fuel in the saddle tank or to plug any ruptures in the tank until after the engine was upright and stable (*see* Winter Affidavit ¶¶ 3, 6 and 10). Respondent also claims it should be protected from liability by Navigation Law § 178-a, which provides spill responders with qualified immunity from liability when rendering assistance with a spill (*see* Winter Affidavit ¶ 12; affirmation Thomas J. Fucillo, dated March 8, 2019, ¶ 11).

When respondent was served staff's complaint, respondent believed NYS&W would handle the matter and forwarded the consent order and complaint to respondent's contact at NYS&W. Respondent was surprised to receive staff's motion papers, and soon thereafter, respondent retained counsel to oppose staff's motion. (*See* Winter Affidavit ¶ 13.)

Respondent requests that staff's motion for a default judgment be denied, and that respondent be granted leave to file an answer within ten (10) days of service of a decision on respondent's request.

Department staff opposes respondent's motion to open the default (*see* Appendix A). Staff argues that respondent has not shown good cause or reasonable excuse for the default or the existence of a meritorious defense to the violations alleged by staff. Department staff claims respondent's course of conduct from the date of the alleged violations, through staff's attempts to compromise the matter by order on consent, and after staff served respondent with the complaint, displays a pattern of ignoring Department staff. (*See* reply affirmation of Stephen Repsher, dated March 13, 2019[Repsher Reply], ¶¶ 3-13.)

Department staff claims respondent's reliance on the immunity provided responders by Navigation Law § 178-a is misplaced. Staff argues that because respondent caused the spill, respondent was not a responder covered by Navigation Law § 178-a. Staff alleges that respondent ignored repeated instructions from Department staff to take appropriate precautions, which resulted in the discharge of an additional 200-400 gallons of diesel fuel. Staff argues that because respondent is responsible for the spill, Navigation Law § 178-a excludes respondent from immunity. (Repsher Reply, ¶¶ 14-21.) Even if respondent was not responsible for the spill, staff argues Navigation Law § 178-a would not provide immunity for respondent because respondent acted in contravention of directions from Department staff. (*Id.* ¶ 22.)

By letter dated March 18, 2019, respondent objected to staff's submission of the Repsher Reply based on the 6 NYCRR 622.6(c)(3) prohibition against filing further responsive pleadings without permission of the ALJ.<sup>1</sup> Respondent requested that the reply be rejected, staff's motion be denied, and respondent be allowed to submit an answer. In response, Department staff argues that respondent's opposition to staff's default motion papers was a motion to which staff may reply. Respondent opposes staff's response and argues that no default has been granted, therefore no motion to reopen is required. (*See* Appendix A.)

## DISCUSSION

The question whether Department staff was entitled to serve a reply to respondent's opposition to staff's motion for a default judgment must be dispensed with first. Respondent argued that 6 NYCRR 622.6(c)(3) prohibits staff's reply without permission of the ALJ. That would be true if respondent simply opposed staff's motion and ask that it be denied. Here, however, respondent is requesting relief from its own default and seeking leave to file a late answer. Such a request constitutes a motion (*see* 6 NYCRR 622.2[k]) or as described above, a cross-motion, to which an opposing party may respond without permission.

Respondent's argument that there is no default judgment or order to reopen, and therefore no need for a motion for the relief respondent seeks, is misplaced. Unlike CPLR 5015, paragraph 622.15(d) contemplates and authorizes reopening a default in answering upon motion and with a proper showing (*see Matter of Charles Miller*, Ruling of the ALJ, June 12, 2018 at 7; *Matter of Glenville Fire District #5*, Ruling of Chief ALJ, August 14, 2012 at 4). While paragraph 622.15(d) reads, "Any motion for a default judgment or motion to reopen a default must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with CPLR section 5015," it goes on to provide that "the ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists."

Respondent's attempts to cast its requests for relief from its default as anything other than a motion or cross-motion are unavailing. After Department staff filed its response to respondent's cross-motion, it is respondent who is prohibited from filing further responsive papers without permission of the ALJ. I have considered respondent's remaining arguments regarding this issue and find they are without merit and have no basis in law. Accordingly,

---

<sup>1</sup> Respondent incorrectly cites 6 NYCRR 622.7(c)(3).

respondent's request to reject Department staff's response to respondent's cross-motion is denied.

Under the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622), an answer to a complaint must be served "[w]ithin 20 days of receiving the notice of hearing and complaint or an amended complaint, the respondent must serve on the department staff an answer signed by respondent, respondent's attorney or other authorized representative. The time to answer may be extended by consent of staff or by a ruling of the ALJ. Failure to make timely service of an answer shall constitute a default and a waiver of the respondent's right to a hearing." (6 NYCRR 622.4[a].)

In addition, an ALJ possesses the discretion to open the default in answering upon a showing that a meritorious defense is likely to exist and that good cause for the default exists (*see* 6 NYCRR 622.15[d]). In opposing respondent's argument that good cause exists for respondent's default, Department staff relies too heavily on respondent's alleged conduct leading up to the service of the complaint. I am weighing whether respondent had a reasonable excuse that lead to the default. Accordingly, on respondent's cross motion, I am considering the events occurring after service of the complaint.

Respondent explained that it did not timely answer the complaint because NYS&W advised respondent that the "derailment and spill were NYS&W's problem and that they [NYS&W] were handling the alleged violations caused by the derailment" (*see* Winter Affidavit ¶ 13). As a result, respondent forwarded the consent order and complaint to NYS&W (*id.*).

After respondent failed to answer the complaint, staff served its motion for default judgment papers on respondent by first class mail. Pursuant to 6 NYCRR 622.6(a)(3), respondent had five days after the motion was served to serve a response. Pursuant to CPLR 2103(b)(2), five days are added to the prescribed period for responding to staff's motion when the motion is served by first class mail. Accordingly, respondent had ten days or until March 8, 2019 to respond to staff's motion. Respondent timely served its opposition papers on staff on March 8.

To determine whether good cause or a reasonable excuse for the default exists, "depends upon the extent of the delay, whether the opposing party has been prejudiced, whether the defaulting party has been willful, and the 'strong public policy' in favor of resolving cases on the merits" (*Matter of Charles Miller*, Ruling of the ALJ, June 12, 2018 at 7, *citing Puchner v Nastke*, 91 AD3d 1261, 1262 [3d Dept 2012]; *see also Huckle v CDH Corp.*, 30 AD3d 878, 879-880 [3d Dept 2006] [CPLR 3215 motion]).

I find there has not been a significant delay in this matter. Respondent discovered the matter had not been handled by NYS&W when respondent was served with staff's motion (*see* Winter Affidavit, ¶ 13). As discussed above, respondent immediately set about opposing staff's motion and timely opposed the motion. Respondent's default does not appear to be willful because respondent "believed NYS&W would respond to the legal documents" (*id.*). Department staff has not alleged any prejudice to staff if respondent is granted permission to file a late answer. I conclude that respondent has shown a reasonable excuse for its default.

Respondent claims that the immunity provided by Navigation Law § 178-a constitutes a meritorious defense to staff's complaint. Section 178-a is entitled "Responder immunity" and reads, in part, as follows:

"2. Notwithstanding any other provision of law, (a) a person is not liable for cleanup and removal costs or damages which result from actions taken or omitted to be taken in good faith in the course of rendering care, assistance or advice consistent with the national contingency plan or as otherwise directed by the federal on-scene coordinator or by the commissioner or his designee, in response to a discharge or threatened discharge of petroleum into or upon the navigable waters.

\* \* \*

"3. However, the provisions of subdivision two of this section shall not apply to: (i) a responsible party, (ii) liability for personal injury or wrongful death, (iii) cleanup and removal costs and damages resulting from such person's gross negligence or willful misconduct, (iv) negligence in the operation of a motor vehicle as defined in section one hundred twenty-five of the vehicle and traffic law, and (v) any physical actions taken that are not in or near the area of cleanup and removal of a discharge or threatened discharge." (Navigation Law § 178-a [2][a] and[3]).

Because respondent was a responder to the rail derailment, which included a spill, I find respondent has shown that a meritorious defense is likely to exist. Department staff, however, would have me conclude that respondent is not entitled to the responder immunity provided by law based on staff's factual allegations and interpretation of the law. Such a conclusion would require a determination of the defense on the merits, which goes beyond the determination of the motions before me. In this matter, the opposing positions of the parties regarding the application of Navigation Law § 178-a raise factual, legal and policy questions that should only be decided after issue is joined. Moreover, the questions raised appear to be ones of first impression.

For the limited purpose of reopening respondent's default in answering, I conclude that the likelihood of a meritorious defense has been shown by respondent.

### **RULING**

Department staff's motion for default judgment is denied. Respondent's motion to serve and file a late answer is granted. Respondent is directed to serve and file its answer within ten days of service of this ruling on respondent. If respondent fails to serve and file an answer as directed herein, staff may renew its motion for default judgment on the papers already filed and served.

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

Dated: March 25, 2019  
Albany, New York

## APPENDIX A

*Matter of Winter's Rigging Inc.*  
*DEC Case No. R4-2018-0918-176*  
Motion for Default Judgment

### Department Staff's Papers

1. Cover letter and Notice of Motion for Default Judgment, dated February 26, 2019
2. Motion for Default Judgment, dated February 26, 2019, attaching Exhibit A:
  - A. Cover letter, notice of hearing and complaint, dated November 29, 2018
3. Affirmation of Stephen Repsher, dated February 26, 2019, attaching Exhibits A-C:
  - A. New York State Department of State, Division of Corporations, Entity Information for Winter's Rigging Inc., current through December 24, 2018
  - B. Affidavit of Service of cover letter, notice of hearing and complaint of Jill Viscusi, sworn to February 26, 2019 attaching a signed certified mail return receipt as Attachment 1
  - C. Affidavit of Service of default papers of Jill Viscusi, sworn to February 26, 2019
4. Affidavit of Thomas Lane in support of motion for default judgment, sworn to February 20, 2019, attaching Exhibits A-E:
  - A. Photograph of ruptured tank
  - B. Photograph of spill associated with ruptured tank
  - C. CD video of leaking tank
  - D. Photograph of spill response absorbent and boom in creek
  - E. NYSDEC Spill Report Form, Spill No. 1805185
5. Proposed order

### Respondent's Papers

1. Cover letter dated March 8, 2019
2. Affirmation of Thomas J. Fucillo, dated March 8, 2019
3. Affidavit of Travis J. Winter, sworn to March 7, 2019, attaching Exhibit A:
  - A. Photographs (3) of derailed locomotive engines
4. Affidavit of service of Tina M. D'Amico, sworn to March 8, 2019
5. Correspondence from Thomas J. Fucillo, dated March 18, 2019
6. Correspondence from Thomas J. Fucillo, dated March 19, 2019

### Department Staff's Reply Papers

1. Reply Affirmation of Stephen Repsher, dated March 13, 2019, attaching Exhibits A-C:
  - A. Cover letter, dated October 17, 2018, from Stephen Repsher to Winter's Rigging, Inc. attaching Order on Consent
  - B. Cover letter, dated November 8, 2018, from Stephen Repsher to Winter's Rigging, Inc. extending deadline for returning Order on Consent
  - C. Notice of hearing and complaint, dated November 29, 2018
2. Correspondence from Stephen Repsher, dated March 19, 2019