STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Articles 15, 25 and 27 of the New York State Environmental Conservation Law (ECL) and Parts 360, 608 and 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

RULING

DEC File No:
R2-20170630-246

-by-

364 MEREDITH AVENUE LLC; S.I. ASPHALT COMPANY, LLC; MCCZ, LLC; RM ASPHALT, LLC; MICHAEL CAPASSO, personally and as member/ managing member/responsible corporate officer of S.I. Asphalt Company, LLC and MCCZ, LLC; and RICHARD MARTUCCI, personally and as member/ managing member/responsible corporate officer of 364 Meredith Avenue, LLC, S.I. Asphalt Company, LLC, and RM Asphalt, LLC,

Respondents.

Procedural History

Staff of the Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondents by service of a notice of hearing and complaint dated March 30, 2021. By its complaint, Department staff alleges that respondents violated multiple provisions of ECL articles 15 (water resources), 25 (tidal wetlands), and 27 (solid waste), and their respective implementing regulations, at a site (site) located at 354 and 364 Meredith Avenue, Staten Island, New York.

Freeborn & Peters LLP,[1] attorneys for respondents 364 Meredith Avenue LLC (Meredith Avenue), RM Asphalt, LLC (RM Asphalt), and Richard Martucci (Martucci) (collectively, the Martucci respondents), filed an answer, dated May 28, 2021, wherein the Martucci respondents generally deny liability for the violations alleged in the complaint and raise several affirmative defenses.

[1] Freeborn & Peters LLP were initial counsel for the Martucci respondents in this proceeding. The Martucci respondents are now represented by Helen C. Mauch, Esq., Mintzer Mauch PLLC (*see* letter from DEC staff to the Deputy Commissioner for Hearings and Mediation Services, dated April 13, 2022, at 2; letter from Mauch to this office, dated June 3, 2022).

Rigano LLC, attorneys for respondents MCCZ, LLC (MCCZ) and Michael Capasso (Capasso) (collectively, the Capasso respondents), filed an answer, dated May 14, 2021, wherein the Capasso respondents generally deny liability for the violations alleged in the complaint and raise several affirmative defenses.

Edward G. McCabe, Esq., attorney for SI Asphalt Company, LLC (SI Asphalt), filed an answer, dated May 13, 2021, wherein respondent SI Asphalt generally denies liability for the violations alleged in the complaint and raises several affirmative defenses.

The Capasso respondents served a demand for production of documents (disclosure demand), dated January 7, 2022, on the Martucci respondents. After the Capasso respondents granted extensions to respond to the disclosure demands, the Martucci respondents provided a response on May 9, 2022 whereby they raised numerous objections to the disclosure demand and produced documents. Counsel to the Martucci respondents affirms that the Martucci respondents have produced hundreds of pages of documents in this proceeding, both in response to the Capasso respondents' disclosure demand and in response to a separate demand for disclosure from DEC.[2]

The Capasso respondents served a revised subpoena (subpoena), dated February 28, 2022, on Ken Thorpe (Thorpe) and various enterprises doing business as NYTDA (collectively, including Thorpe, the Thorpe entities). None of the Thorpe entities are parties to this proceeding. Nevertheless, the Capasso respondents sought documents from the Thorpe entities as "prospective purchaser[s] of the real property located at 364 Meredith Avenue" (subpoena at 2).

Capasso respondents served a motion to compel disclosure (motion to compel), dated June 1, 2022. The motion to compel seeks full compliance with the disclosure demand and with the subpoena or, in the alternative, preclusion of the Membership Interest Purchase Agreement (MIPA) between the respondents, dated March 13, 2020. The motion papers include a notice of motion (notice of motion) and an affirmation (Rigano affirmation) of Nicholas C. Rigano, Esq., affirmed June 1, 2022, with attached exhibits.

Martucci respondents filed a response (Martucci reply), dated July 6, 2022, to the motion to compel. The Martucci reply includes an affirmation (Mauch affirmation) of Helen C. Mauch, Esq., affirmed July 6, 2022, with attached exhibits, and an affidavit (Martucci affidavit) of Richard Martucci, sworn July 1, 2022. The Martucci respondents oppose the motion to compel on the grounds that the requested materials are irrelevant, privileged, or both. They also oppose preclusion of the MIPA.

DEC staff filed a response (staff reply), dated June 6, 2022, to the motion to compel. Staff states that it "takes no position" with regard to the motion to compel, except that staff

[2] *See* affirmation of Helen C. Mauch, Esq., affirmed July 6, 2022, ¶¶ 33, 35 (stating that "the Martucci Respondents responded to DEC's First Notice to Produce and produced documents bates stamped RMA 00001–00594, which was supplemented . . . with documents bates stamped RMA 00605–00691" and "served their objections to the [Capasso respondents' disclosure demand] on May 9, 2022, and produced documents bate[s] stamped RMA 00692–00792").

objects to the Capasso respondents' alternative remedy to preclude the MIPA. Staff notes that the motion to compel does not assert that staff has failed to comply with any disclosure demands. Therefore, staff argues, it should not be precluded from introducing the MIPA.

SI Asphalt filed an affirmation (McCabe affirmation) of Edward G. McCabe, Esq., affirmed June 8, 2022, to the motion to compel. SIA Asphalt argues in favor of the motion to compel noting the State's liberal disclosure policy and asserting that the Martucci respondents have offered the MIPA as evidence of the Capasso respondents' control of the site.

To date, none of the Thorpe entities has filed a response to the motion to compel.

Positions of the Parties

Capasso respondents argue that the Martucci respondents "cannot have it both ways" by, on the one hand stating that "they would rely on [the MIPA] *in this proceeding*," while on the other hand "with[holding] pertinent documents . . . associated with the MIPA" (Rigano affirmation ¶ 3 [emphasis in original]). The Capasso respondents also assert that the Thorpe entities have failed to respond to a duly served subpoena and that DEC counsel "agreed the documents requested therein were relevant" (*id*. ¶ 4).

Capasso respondents argue that "the documents sought for production from both the Martucci Respondents and the Thorpe Parties will likely show:

> (i) Martucci Respondents' pre-MIPA knowledge of NYSDEC's asserted violations at issue here,
> (ii) Martucci Respondents' efforts to withhold that knowledge from Moving Respondents, and
> (iii) Martucci Respondents' inaction to cure the violations despite their knowledge" (Rigano affirmation ¶ 5).

Capasso respondents further argue that if certain representations made by the Martucci respondents under the MIPA are false, "such misrepresentations would bolster [Capasso respondents'] assertions that, *inter alia*, (i) the MIPA itself is not relevant here, and (ii) the doctrine of rescission voids the MIPA" (Rigano affirmation ¶ 5).

The Martucci respondents argue that the MIPA is irrelevant to the Capasso respondents' liability as an owner of SI Asphalt. They note that, prior to execution of the MIPA, MCCZ was a 50 percent owner of SI Asphalt and upon execution of the MIPA, MCCZ became the 100 percent owner of SI Asphalt. Therefore, according to the Martucci respondents, even if the MIPA were precluded from the record and the shift in ownership of SI Asphalt were not considered, MCCZ would remain a 50 percent owner of SI Asphalt (Mauch affirmation ¶¶ 3, 7, 8).

The Martucci respondents further argue that, because SI Asphalt permanently closed and ceased its operations in December 2019, the March 13, 2020 MIPA is not relevant to the issue operator liability (Mauch affirmation ¶ 7; *see also* Rigano affirmation ¶ 8 [noting that, during all

relevant times, SI Asphalt operated the plant at the site and that "[t]he plant permanently closed in December 2019 and . . . SIA ceased its operations"]).

DEC staff "takes no position" with regard to the motion to compel, except that it objects to the Capasso respondents' "alternative remedy" to preclude the MIPA (staff reply at 1). Staff argues that it "cannot be penalized just because one group of respondents, or a third party, or both, fail(s) to comply with a discovery demand" (*id.* [citation omitted]). Therefore, staff argues, it should not be precluded from introducing the MIPA in this proceeding.

Respondent SI Asphalt argues that the motion to compel should be granted because the "Martucci Respondents['] introduction of the MIPA as evidence of dominion and control of the Subject Property has made discovery of the facts and circumstances surrounding the MIPA . . . material and necessary in the defense of this action" (SIA reply ¶ 9). Respondent SI Asphalt also argues that the subpoena on the Thorpe entities should be enforced, citing its arguments in favor of compelling disclosure by the Martucci respondents (*id*. ¶ 23).

As previously noted, the Thorpe entities have not responded to the motion to compel.

Discussion

The scope of disclosure in DEC enforcement proceedings is, with certain exceptions, as broad as that provided for under CPLR article 31 (*see* 6 NYCRR 622.7[a]). Accordingly, any matter that is "material and necessary" to the prosecution or defense of this matter is to be disclosed unless it is protected from disclosure pursuant to law (*see* CPLR 3101; 6 NYCRR 622.11[a][3]). The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial . . . The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co*., 21 NY2d 403, 406 [1968]).

Disclosure, however, is not unlimited. Importantly, "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant—regardless of whether discovery is sought from another party or a nonparty" (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [citations omitted]; *see also Dani v 551 W. 21st St. Owner LLC,* 181 AD3d 420, 420–21 [1st Dept 2020] [holding that a party "failed to satisfy the 'threshold requirement' that the request was reasonably calculated to yield information that is 'material and necessary'" and that "[t]he affidavits submitted in support of the motion . . . were too speculative to warrant disclosure"] [citation omitted]).

Further, in assessing whether a demand is material and necessary, "[t]he issues framed by the pleadings determine the scope of discovery" (*Brennan v Demydyuk,* 196 AD3d 1113, 1114–15 [4th Dept 2021] [citation and quotation marks omitted]). Notably, the court in *Brennan* reversed a lower court's grant of a motion to compel disclosure because the demand "failed to meet the threshold for disclosure by showing that [the demand] was reasonably calculated to yield information material and necessary" to the action (*id*. [citing *Forman* at 661] [other citations and internal quotation marks omitted]).

Where a party fails to comply with a disclosure demand without having made a timely objection, the proponent of the demand may apply to the ALJ to compel disclosure (6 NYCRR 622.7[c][2]). Additionally, where disclosure is sought from a non-party witness "the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested" (6 NYCRR 622.10[b][1][vi]). Here, the motion to compel seeks compliance with the Capasso respondents' disclosure demand on the Martucci respondents and subpoena on the Thorpe entities.

Because the Capasso respondents failed to satisfy the threshold requirement to demonstrate that the demands at issue are material and necessary, I deny the motion to compel and quash the subpoena served on the Thorpe entities.

As set forth in the notice of motion, the focus of the motion to compel is documentation relating to the MIPA and to the potential sale or lease of the site to one or more of the Thorpe entities, or to any other third party (*see* notice of motion at 2-3). Documentation related to the potential sale or lease of the site is, according to the Capasso respondents, "associated with the MIPA" because the documentation will "likely show" that the Martucci respondents had knowledge of the violations alleged by DEC in this proceeding before the MIPA was executed and that the Martucci respondents withheld that knowledge from the Capasso respondents (Rigano affirmation ¶¶ 3, 5).

Indeed, each of the disclosure demands specified in the notice of motion refers to documents or communication involving either the Thorpe entities (potential purchasers of the site), or any other potential third-party purchaser or lessee of the site (notice of motion at 2-3). Alternatively, the Capasso respondents seek preclusion of the MIPA (*id.* at 3). As discussed below, documentation concerning these matters is not relevant to the allegations set forth in the complaint and, therefore, disclosure demands seeking such documentation are improper in this proceeding (*see U.S. Bank Trust, N.A. v Carter*, 204 AD3d 727, 729 [2d Dept 2022] [holding that "many of the requests made in the . . . discovery demands were palpably improper, since they sought irrelevant information, or were overbroad and burdensome" and that "[u]nder these circumstances, the appropriate remedy is to vacate the entire demand rather than to prune it"] [internal quotation marks and citations omitted]).

The Capasso respondents assert that they "are entitled to develop facts through discovery to ascertain whether the material representations made by Martucci in the MIPA were correct when they were made and whether Martucci withheld information" (Rigano affirmation ¶ 58). As the court noted in *Brennan*, however, "the issues framed by the pleadings determine the scope of discovery" (*Brennan* at 1114 [internal quotation marks and citation omitted]). Accordingly, the determination of whether a disclosure demand is relevant begins with the complaint.

Here, each of the alleged violations set forth in the complaint commenced prior to the effective date of the MIPA. The first count of the first cause of action, for example, is alleged to have commenced at the time that DEC issued a permit for an asphalt plant at the site, on November 10, 2014. DEC alleges that respondents were required to remove a barge from the tidal wetland at that time and failed to do so (complaint ¶¶ 28, 70). Further, the large majority of causes of action in the complaint are alleged to have commenced on or before May 19, 2017 (*see*

complaint causes of action 4-12, 15). I also note that the complaint does not allege that any cause of action or count commenced after the MIPA became effective.

Notably, the complaint does not mention or reference the MIPA in any way. Indeed, the record indicates that DEC staff was unaware of the MIPA when staff issued the complaint on March 30, 2021. The complaint states that both RM Asphalt and MCCZ own 50 percent of the membership interest of SI Asphalt (complaint ¶¶ 8, 10). Under the terms of the MIPA, which became effective on March 13, 2020 (a year prior to the complaint), MCCZ became owner of 100 percent of the membership interest in SI Asphalt. There is nothing in the record before me that indicates that the MIPA informed DEC staff's determination to file the complaint, nor its determination to name Capasso and MCCZ as respondents in this matter.

To the extent that the liability of any one or more of the Capasso respondents may be premised upon having an ownership interest in SI Asphalt, as alleged in the complaint, such interest exists with or without the MIPA.[3] That is, prior to the MIPA respondent MCCZ held a 50 percent ownership interest in SI Asphalt and respondent Capasso held a 100 percent ownership interest in MCCZ. Absent the MIPA, the Capasso respondents' ownership interests would remain unchanged.

With regard to control over SI Asphalt's operations, the Capasso respondents admit that the MIPA was not executed until months after SI Asphalt ceased its operations at the site. The MIPA did not become effective until March 13, 2020, and SI Asphalt permanently closed and ceased its operations in December 2019 (*see* Rigano affirmation ¶ 8 [noting that, during all relevant times, SI Asphalt operated the plant at the site and that "[t]he plant permanently closed in December 2019 and . . . SI [Asphalt] ceased its operations"]; *see also* Mauch affirmation ¶ 7 [asserting that the post-closure transfer of ownership "does not establish operational control of SI [Asphalt] during its period of operations" at the site]).

Accordingly, to the extent that the liability of any one or more of the Capasso respondents may be premised upon control over aspects of SI Asphalt's operations, as alleged in the complaint, such control was not affected by the MIPA.[4] That is, because SI Asphalt permanently closed and ceased its operations three months prior to the effective date of the MIPA, liability premised on control over its operations would pre-date the MIPA.

To the extent that the Capasso respondents' pleading seeks to shift liability to other respondents for alleged violations that continued after the effective date of the MIPA, they may seek relief in a separate contribution action initiated pursuant to CPLR Article 14 (*see Matter of Universal Waste, Inc.*, Second Interim Decision, Aug. 16, 1989, at 1 [holding that "regardless of the liability which these other parties have to the Respondents, Respondents' liability to the State

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[3] No determination is made herein, and none should be inferred, regarding whether any respondent may be held liable under any cause of action on the basis of that respondent's alleged ownership interest in SI Asphalt.

[4] No determination is made herein, and none should be inferred, regarding whether any respondent may be held liable under any cause of action on the basis of that respondent's alleged control over the operations of SI Asphalt.

would remain unchanged"]). DEC enforcement matters are not the proper forum for resolving claims among respondents for contribution or indemnification (*see Matter of Huntington and Kildare, Inc.*, Ruling, Nov. 15, 2006, at 4 [citing *Universal Waste* at 1] [additional citations omitted]).

I note that the dispute between the parties regarding the legal force and effect of the MIPA has already resulted in the commencement of a civil action. In April 2022, the Martucci respondents filed a complaint (Martucci complaint) against the Capasso respondents and SI Asphalt seeking to enforce the MIPA (Mauch affirmation at 3 n 1; *see also id*., attachment B). The Martucci complaint alleges that the defendants have "refus[ed] to honor their clear obligations" under the MIPA (*id*., attachment B ¶ 1). The Martucci complaint further alleges that the failure of the Capasso respondents and SI Asphalt to fulfill their obligations under the MIPA date back to late 2020 (*see e.g. id*. ¶¶ 76-79). It is clear that the legal force and effect of the MIPA will be litigated in that action. This proceeding, however, is not the proper forum for the parties to resolve their long-standing dispute regarding the MIPA.

With regard to the subpoena served on the Thorpe entities, I note that DEC counsel initially sought to have the Capasso respondents withdraw the subpoena. DEC counsel stated that the subpoena was "clearly unrelated to the violations at issue and serve[s] either as [a] fishing expedition or to harass a potential buyer of the subject site with no known, apparent, or suggested involvement in the violations that your clients are accused of being involved in" (motion to compel, exhibit 15 at 1).

The Capasso respondents assert, however, that after discussing the relevance of the subpoena with the parties, DEC counsel reconsidered his opposition to the subpoena and advised that "he understood the relevance of the documents sought . . . via the Subpoena" (Rigano affirmation ¶ 37). The Martucci respondents contest that assertion, stating that they participated in the referenced discussion and that "DEC has not weighed in on the relevance of the documents sought by Moving Respondents and it is inaccurate for Moving Respondents to claim otherwise" (Mauch affirmation at 9 n 6).

DEC counsel's written response to the motion to compel states only that DEC staff "takes no position with respect to the Motion to Compel, **except** to object to . . . preclusion of the [MIPA]" (staff reply at 1 [emphasis in original]). The DEC reply further states that "[e]ven if the MIPA was entered into as the result of misrepresentations . . . it is still a relevant piece of evidence for Staff's case in chief as it describes the individual respondents' ownership interests and relationship to the corporate and company respondents, along with other facts pertinent to this proceeding" (*id*.).

On this record, I conclude that DEC staff neither supports nor opposes the motion to compel as it relates to the enforcement of the subpoena. I also note that there is no indication in the record before me that DEC staff has sought disclosure in relation to the execution of the MIPA nor in relation to the potential sale of the site.

The Capasso respondents have failed to satisfy the threshold requirement to demonstrate that the subpoena is reasonably calculated to yield information that is material and necessary to

this proceeding. The involvement of the Thorpe entities in the site was limited to their role as a potential purchaser of the site in or after 2020. Accordingly, disclosure related to the as yet unconsummated purchase of the site by one or more of the Thorpe entities has not been shown to be material and necessary to the issues raised in the pleadings.

Notably, the motion to compel makes only a limited attempt to demonstrate the materiality of the documents sought under the subpoena, generally asserting that the Thorpe entities were "duly served" and must respond (Rigano affirmation ¶ 4). The Capasso respondents argue that "the documents requested [under the subpoena] were relevant due to Martucci Respondents' reliance on the MIPA, among other reasons" (*id*.). As previously discussed, however, I have concluded that disclosure sought by the Capasso respondents regarding the MIPA is not material and necessary to this proceeding.

I conclude that the Capasso respondents have failed to make the threshold showing that the materials sought under the disclosure demand or the subpoena are material and necessary in their defense of this proceeding. Accordingly, I deny the motion to compel.

Ruling

Capasso respondents' motion to compel disclosure is denied and the subpoena served on the Thorpe entities is quashed.

/s/
Richard A. Sherman
Administrative Law Judge

Dated: Albany, New York
November 7, 2022