

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

In the Matter of the Alleged Violations of
Article 19 of the Environmental Conservation
Law ("ECL") and Part 232 of Title 6 of the
Official Compilation of Codes, Rules
and Regulations of the State of
New York ("6 NYCRR") by

ORDER

FIVE STAR CLEANERS, INC.,

Respondent.

Case No. D1-2101-04-02

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Five Star Cleaners, Inc., by service of a notice of hearing and complaint dated May 20, 2005.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), Department staff properly served respondent (1) by hand delivering one original and one copy of the notice of hearing and complaint to the New York State Department of State on May 20, 2005, in conformance with Business Corporation Law § 306(b), and (2) pursuant to CPLR 3215(g)(4), by mailing a copy of the notice of hearing and complaint by first class mail to respondent, at respondent's last known address.

The complaint alleged that respondent Five Star Cleaners, Inc. violated 6 NYCRR 232.14(a)(1) by operating a dry cleaning facility located at 162 Wheeler Road, Central Islip, New York without a current and valid owner/manager certification.

The notice of hearing stated that a pre-hearing conference was scheduled for June 28, 2005 at 3:45 p.m. at the Department's Region One headquarters in Stony Brook. The notice of hearing stated further that failure to serve an answer within twenty days after receipt of the notice of hearing, or failure to appear at the pre-hearing conference, constituted a default and a waiver of respondent's right to a hearing.

Respondent failed to answer the complaint, and failed to appear at the pre-hearing conference. On October 23, 2006, Department staff filed a motion for default judgment with the Department's Office of Hearings and Mediation Services. In

addition, because more than one year had elapsed between the date of the default and the filing of the motion, Department staff properly served the default judgment motion upon respondent pursuant to CPLR 3215(g).

The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa, who prepared the attached summary report. I adopt the ALJ's report as my decision in this matter. Based upon the record, I conclude that the civil penalty that Department staff proposed is appropriate.

NOW, THEREFORE, having considered this matter, and being duly advised, it is **ORDERED** that:

- I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.
- II. Respondent Five Star Cleaners, Inc. is adjudged to be in default and to have waived its right to a hearing in this enforcement proceeding. Accordingly, Department staff's allegations against respondent in the complaint are deemed to have been admitted by respondent.
- III. Respondent is adjudged to have violated ECL article 19 and 6 NYCRR 232.14(a)(1) by operating a dry cleaning facility without a current and valid owner/manager certification.
- IV. Respondent Five Star Cleaners, Inc. is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000.00). The civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and delivered via overnight mail, certified mail or hand delivery to Michael J. Derevlany, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.
- V. All communications from respondent to the Department concerning this order shall be made to Michael J. Derevlany, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-5500.
- VI. The provisions, terms and conditions of this order

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Article 19 of the Environmental Conservation
Law ("ECL") and Part 232 of Title 6 of the
Official Compilation of Codes, Rules
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Summary Report:
Motion for Default
Judgment

FIVE STAR CLEANERS, INC.,

Respondent.

Case No. D1-2101-04-02

PROCEEDINGS

In a notice of hearing and complaint dated May 20, 2005, the Department of Environmental Conservation (the "Department") asserted that respondent Five Star Cleaners, Inc. ("Five Star"), violated Section 232.14(a)(1) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") by operating a dry cleaning facility located at 162 Wheeler Road, Central Islip, New York without a current and valid owner/manager certification. In the complaint, Department Staff asked the Commissioner to find Five Star in violation of Article 19 of the New York State Environmental Conservation Law, and 6 NYCRR Part 232.

With the complaint, Department Staff served a notice of hearing dated May 20, 2005. The notice stated that respondent's answer was due within twenty days of receipt of the complaint. The notice stated further that a default and waiver of Five Star's right to a hearing would result if Five Star did not file a timely answer. In addition, the notice stated that a pre-hearing conference was scheduled for June 28, 2005 at 3:45 p.m. at the Department's Region One headquarters in Stony Brook, and that failure to appear at the pre-hearing conference constituted a default and a waiver of respondent's right to a hearing.

Pursuant to 6 NYCRR Section 622.15, Department Staff moved for a default judgment against respondent. Department Staff made its motion on October 23, 2006 by filing the following documents with the Department's Office of Hearings and Mediation Services:

1. a notice of motion for default judgment dated October 23, 2006;

2. the Affirmation of Michael J. Derevlany, Esq. in support of Motion for Default Judgment, dated October 23, 2005 (the "Derevlany Affirmation"); and
3. a proposed summary report and proposed order.

In addition, Department staff mailed the above documents, on the same date, to respondent.

As part of its motion for default judgment, Department Staff offered the Affidavit of Alyce M. Gilbert, Esq., sworn to May 20, 2005 (the "Gilbert Affidavit") to show proof of service of the complaint and notice of hearing upon respondent. The Gilbert Affidavit stated that service was effected upon Five Star by hand delivering one original and one copy of the notice of hearing and complaint to the New York State Department of State, as provided for in Section 306(b) of the Business Corporation Law. The Gilbert Affidavit went on to state that on that same date, a copy of the notice of hearing and complaint were also mailed, pursuant to Section 3215(g)(4) of the New York Civil Practice Law and Rules ("CPLR"), to respondent at respondent's last known address. (see Matter of Polanaya Corp., Decision and Order of the Acting Commissioner, at 1, 2005 WL 859048, * 1 (April 12, 2005)(where service is made upon a corporation by serving the Secretary of State pursuant to BCL § 306(b), additional service of the complaint by first class mail pursuant to CPLR 3215(g)(4) satisfies notice requirements for a default judgment)).

According to the Derevlany Affirmation, Five Star did not file a timely answer to the complaint, nor did respondent appear for the pre-hearing conference. Respondent has not opposed the motion, and, as of the date of this Summary Report, the Office of Hearings and Mediation Services had not received a reply from respondent to the motion.

Department Staff's complaint did not seek a specific penalty amount. In its motion for default judgment, Department Staff requested that the Commissioner assess a civil penalty of \$5,000 pursuant to ECL 71-2103(1) for the violation alleged. That provision provides in the case of a first violation for a penalty of not less than \$375 and not more than \$15,000, and an additional penalty not more than \$15,000 per day of continuing violation.

The Derevlany Affirmation stated that the civil penalty amount was calculated "taking into consideration applicable guidance including the Department's Civil Penalty Policy Enforcement Guidance Memorandum." Derevlany Affirmation, at ¶

10. The Derevlany Affirmation went on to state that the potential harm and actual damage attributable to the violation were significant, and had the potential to result in significant quantities of toxic material being released, with resulting harm to public health and the environment. According to the Derevlany Affirmation, the violation alleged relates to requirements essential to the regulatory scheme, and respondent's lack of cooperation and failure to respond to Department Staff's enforcement efforts required Department Staff to expend substantial resources to seek a default judgment to ensure that respondent is penalized appropriately and deterred from future violations.

DEFAULT PROCEDURES

Section 622.15 of 6 NYCRR, "Default Procedures," provides in pertinent part:

- (a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.
- (b) The motion for a default judgment may be made orally on the record or in writing and must contain:
 - (1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding;
 - (2) proof of the respondent's failure to appear or failure to file a timely answer; and
 - (3) a proposed order.
- (c) Upon a finding by the ALJ that the requirements of subdivision (b) of this section have been adequately met, the ALJ will submit a summary report, which will be limited to a description of

the circumstances of the default, and the proposed order to the commissioner.

Thus, Section 622.15(a) allows the Department to request a default judgment if a respondent does not file an answer to a complaint in a timely manner, or does not appear at a pre-hearing conference when one has been scheduled pursuant to Section 622.8. When considering a motion for default judgment, the scope of the administrative law judge ("ALJ")'s review is limited to whether the Department has met the requirements outlined in Section 622.15(b), and to submit "a summary report, which will be limited to a description of the circumstances of the default, and the proposed order to the commissioner." 6 NYCRR Section 622.15(c). In addition, the ALJ considers whether the complaint states a claim upon which relief may be granted, and examines whether the penalty and any remedial measures sought by Department Staff are warranted and supported adequately (see Matter of Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, at 4-5, 2006 WL 2105981, * 2 (July 25, 2006)). Therefore, the Findings set forth below are based upon the papers submitted, as identified above, and are limited as prescribed by Section 622.15(c) and Matter of Hunt, supra.

FINDINGS

1. On May 20, 2005, service was effected upon Five Star by hand delivering one original and one copy of the notice of hearing and complaint to the New York State Department of State, as provided for in Section 306(b) of the Business Corporation Law. On that same date, a copy of the notice of hearing and complaint were also mailed, pursuant to Section 3215(g)(4) of the CPLR, to respondent at respondent's last known address.
2. Department Staff's complaint asserted that Five Star violated ECL Article 19 and 6 NYCRR Section 232.14(a)(1) by operating a dry cleaning facility located at 162 Wheeler Road, Central Islip, New York without a current and valid owner/manager certification.
3. The Department's May 20, 2005 notice of hearing stated that an answer was due within twenty days of receipt of the complaint. The notice stated further that a default and a waiver of respondent's right to a hearing would result if respondent did not file a timely answer.

4. No response to the complaint has been received, and the time to answer has lapsed.
5. The notice of hearing also stated that a pre-hearing conference was scheduled for 3:45 p.m. on June 28, 2005 at the Department's Region One office. The notice stated further that a default and a waiver of respondent's right to a hearing would result if respondent did not appear for the pre-hearing conference.
6. Respondent failed to appear for the pre-hearing conference.
7. On October 23, 2006, this motion was filed with the Office of Hearings and Mediation Services, and a copy of the motion was served upon respondent. The motion included (1) proof of service of the May 20, 2005 Notice of Hearing and the Complaint; (2) proof of respondent's failure to file a timely answer; and (3) a proposed order.
8. No response to Department Staff's motion has been filed with the Office of Hearings and Mediation Services.
9. The requirements for a default judgment have been met adequately as prescribed by 6 NYCRR Section 622.15(b).
10. The \$5,000 penalty requested is rationally supported by the documentary evidence in Department Staff's motion.

CONCLUSIONS AND RECOMMENDATIONS

The Department may commence an administrative proceeding with service of a notice of hearing accompanied by a complaint. 6 NYCRR Section 622.3(a)(1). Service of the notice of hearing and complaint must be by personal service consistent with the CPLR, or by certified mail. 6 NYCRR Section 622.3(a)(3). Service is complete when the notice of hearing and complaint are received. Id. The Gilbert Affidavit establishes that Department Staff duly served the May 20, 2005 notice of hearing and complaint upon Five Star in a manner consistent with Section 622.3(a)(3).

The Derevlany Affirmation is unrefuted, and establishes that respondent did not answer the complaint, and failed to appear for the pre-hearing conference. The May 20, 2005 notice of hearing informed respondent that failure to timely answer or appear at

the pre-hearing conference would result in a default, and a waiver of respondent's right to a hearing. Therefore, I conclude that the requirements for a default judgment, as outlined in 6 NYCRR Section 622.15(b), have been met.

Accordingly, the Commissioner should grant the motion for a default judgment. In granting the motion, the Commissioner should find that respondent violated Section 232.14(a)(1) of 6 NYCRR by operating a dry cleaning facility located at 162 Wheeler Road, Central Islip, New York without a current and valid owner/manager certification. Based upon these findings, the Commissioner should conclude that respondent violated ECL Article 19 and 6 NYCRR Section 232.14(a)(1). This summary report and proposed order (attached hereto) are referred to the Commissioner for final determination.

/s/

Maria E. Villa
Administrative Law Judge

November 2, 2006
Albany, New York

To: (via certified mail, return receipt requested)

Five Star Cleaners, Inc.
c/o Jung Min Kim
162 Wheeler Road
Central Islip, New York 11722-2025

(via hand delivery)

Michael J. Derevlany, Esq.
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New York State Department of Environmental Conservation
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