STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 33 of the New York State Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes. Rules and Regulations of the State of New York ("6 NYCRR"),

ORDER

DEC Case No.
R4-2015-1117-133

- by -

IDEAL MANAGEMENT SERVICES, LLC,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation ("Department" or "DEC") that Ideal Management Services, LLC ("respondent") violated:

(i) ECL 33-1301(8) and 6 NYCRR 325.7(a), by applying pesticides at a commercial rental unit located at 74-76 Linden Street, Schenectady, New York ("site") on or about September 10, 2015 through September 17, 2015 without being a certified applicator or working under the direct supervision of a certified applicator; and

(ii) ECL 33-0905(5)(a), by failing to provide product labels for the pesticides sprayed at the site on or about September 10, 2015 through September 17, 2015.

(see Complaint, attached as Attachment 1 to Affirmation of Dusty Renee Tinsley, Esq., dated February 17, 2016, at ¶¶ 6-19). The pesticides were applied to control bed bugs at the site (see Affidavit of Brayton Pendell, sworn to February 17, 2016, ¶ 17).

Administrative Law Judge ("ALJ") D. Scott Bassinson of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Bassinson prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, Department staff served a notice of hearing and complaint on respondent by certified mail. Respondent failed to file an answer to the complaint within 20 days after completion of service of the notice of hearing and complaint (see Default Summary Report at 1-2). Staff filed and served a motion for default judgment with supporting papers on February 17, 2016.

As the ALJ properly held, staff has satisfied the procedural requisites for obtaining a default judgment, submitting (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to file an answer; and (iii) a proposed order (see Default Summary Report at 2; see also 6 NYCRR 622.15[b][1]-[3]). The ALJ also held that staff submitted proof of the facts sufficient to support that portion of the first cause of action in the complaint alleging a violation of ECL 33-1301(8) (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). However, the ALJ concluded that staff had not satisfied this requirement with respect to that portion of the first cause of action alleging a violation of 6 NYCRR 325.7(a), or with respect to the second cause of action (see Default Summary Report at 3-5).

I agree. Staff has submitted proof of the facts sufficient to support the claim that respondent illegally applied pesticides at the site, and, accordingly, I conclude that respondent violated ECL 33-1301(8). I also agree with the ALJ's conclusion that respondent is not liable for a violation of 6 NYCRR 325.7(a). That regulatory provision discusses prohibitions relating to "individuals" only, and would not apply to this respondent which is a domestic limited liability company.

The ALJ has also recommended that I deny staff's motion for a default judgment with respect to staff's second cause of action, which alleges that that respondent violated ECL 33-0905(5)(a) when it failed "to provide product labels for the pesticides sprayed at the Commercial Property to the occupants of the Commercial Property" (Complaint ¶ 19). ECL 33-0905(5)(a) requires a certified applicator, prior to the application of a pesticide "within or on the premises of a dwelling," to supply the occupants "with a copy of the information, including any warnings, contained on the label of the pesticide to be applied." Such information is to be supplied in a written, digital or electronic format (see id.). The ALJ concludes that staff's language in the complaint is insufficient to support its claim because, in stating that respondent failed to provide product labels, staff failed to state that the required information was not furnished in any other of the formats authorized by the statute. I adopt the ALJ's recommendation, based on my consideration of this same issue in a recent pesticide enforcement proceeding (see Matter of Gibson, Order of the Commissioner, July 5, 2016, at 2).

ECL 71-2907(1) provides for a penalty of up to $5,000 for a first violation of "any provision of [ECL] article 33," and up to $10,000 for each subsequent offense. In this proceeding, staff seeks a total civil penalty of two thousand dollars ($2,000), comprised of one thousand dollars ($1,000) for each cause of action (see Default Summary Report at 5).

The ALJ recommends that I assess a total civil penalty of one thousand dollars ($1,000) because he found only one violation (see id.). Respondent, however, was on notice that a civil penalty of two thousand dollars ($2,000) was being requested, and the penalty provisions of the statute fully support a penalty of two thousand dollars ($2,000) for a violation of ECL 33-1301(8) alone. Enforcement of the pesticide laws is necessary for the protection of public health. The illegal application of pesticides here in commercial rental units exposes members of the public to potential harmful effects. Furthermore, the Department's pesticide enforcement policy (see Commissioner Policy DEE-12 dated March 26, 1993 [DEE-12]) indicates that penalties in

adjudicated cases should be substantially higher than what is proposed in the guidance (see e.g. DEE-12, at 1).

In the circumstances of this matter, a civil penalty of two thousand dollars ($2,000) is authorized and appropriate. I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order on respondent, as requested by Department staff and recommended by the ALJ.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted with respect to that portion of the first cause of action alleging that respondent violated ECL 33-1301(8).

II. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is otherwise denied.

III. Based upon proof of the facts submitted, respondent Ideal Management Services, LLC is adjudged to have violated ECL 33-1301(8).

IV. Within thirty (30) days of the service of this order upon respondent Ideal Management Services, LLC, respondent shall pay a civil penalty in the amount of two thousand dollars ($2,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

Office of General Counsel, Region 4
NYS Department of Environmental Conservation
1130 North Westcott Road
Schenectady, New York 12306-2014
Attn: Dusty Renee Tinsley, Esq.

V. Any questions or other correspondence regarding this order shall also be addressed to Dusty Renee Tinsley, Esq. at the address referenced in paragraph IV of this order.

VI. The provisions, terms and conditions of this order shall bind respondent Ideal Management Services, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By: _____
Basil Seggos
Commissioner

Dated: Albany, New York
August 18, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 33 of the New York State Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

DEFAULT SUMMARY REPORT

DEC Case No.
R4-2015-1117-133

- by -

IDEAL MANAGEMENT SERVICES, LLC,

Respondent.

I. Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served respondent Ideal Management Services, LLC ("respondent") with a notice of hearing and complaint, dated December 23, 2015, asserting two causes of action alleging violations of New York State Environmental Conservation Law ("ECL") § 33-1301(8), ECL § 33-0905(5)(a), and section 325.7(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") relating to the alleged application of pesticides at 74-76 Linden Street, Schenectady, New York ("Commercial Property" or "property"). Department staff requests in its complaint that the Commissioner issue an order: (i) imposing a civil penalty of two thousand dollars ($2,000); (ii) stating that respondent shall no longer offer the service of commercial pesticide application unless he has complied with all applicable pesticide regulations and laws; and (iii) directing all other and further relief deemed necessary and appropriate.

Staff sent its notice of hearing and complaint to respondent by certified mail, return receipt requested, on December 23, 2015, addressed to "Jay Sacks, Ideal Management Services, LLC." See Affirmation of Dusty Renee Tinsley, Esq., dated February 17, 2016 ("Tinsley Affirmation"), at ¶ 2; see also id. Attachment 2 (copies of certified mail receipt and signed return card); id. Attachment 4 (Affidavit of Service by Jill Viscusi, sworn to February 10, 2016 ("Viscusi Aff.")). Staff has submitted copies of: (i) the certified mail receipt, which was signed on behalf of respondent and on which the box marked "Agent" was checked; and (ii) the U.S. Postal Service tracking sheet, reflecting that the notice of hearing and complaint were delivered on December 30, 2015. See Tinsley Affirmation, Attachments 2 and 3; see also Viscusi Aff. Attachments "a" and "b." Thus, service on respondent of the notice of hearing and complaint was complete on December 30, 2015. See 6 NYCRR § 622.3(a)(3).

Staff's notice of hearing stated that respondent was required to "file a written answer to the charges of the violations alleged within twenty (20) days of receipt of the Complaint," and that failure to serve a timely written answer "will result in a default and a waiver of your right to

a hearing; and, pursuant to 6 NYCRR 622.15, an Order may be issued against you granting the relief requested in the attached Complaint." Tinsley Affirmation, Attachment 1. Respondent failed to serve an answer to the complaint. See Tinsley Affirmation ¶ 6. Staff now moves for a default judgment pursuant to 6 NYCRR § 622.15.

As discussed below, I recommend that the Commissioner grant staff's motion for a default judgment in part.

II. Discussion

A respondent served with a notice of hearing and complaint must serve an answer within 20 days of receiving the notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). Upon a respondent's failure to answer a complaint, Department staff may make a motion to an administrative law judge ("ALJ") for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

The record in this matter establishes satisfaction of the requirements of section 622.15: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent has failed to file an answer to the complaint; and (iii) Department staff has submitted a proposed order. See Tinsley Affirmation Attachment 7. Staff also served respondent with copies of the motion for default judgment and supporting papers. See February 17, 2016 letter from Dusty Renee Tinsley, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

In addition to satisfying the requirements of section 622.15, a motion for default judgment must include proof of the facts constituting the claim charged. See Matter of Queen City Recycle Center, Inc., Order of the Commissioner, December 12, 2013, at 3 (directing that staff's default motion papers must be consistent with CPLR 3215(f)). A party seeking a default judgment is "required to allege enough facts to enable the court to determine that a viable cause of action exists." Jacobsen v. S & F Service Center, 131 A.D.3d 450, 451 (2d Dep't 2015).

As discussed below, I find that the complaint alleges facts sufficient to find that a viable cause of action exists with respect to that portion of the first cause of action in the complaint alleging a violation of ECL § 33-1301(8). I therefore recommend that the Commissioner grant staff's motion for a default judgment with respect to that portion of the first cause of action. With respect to (i) that portion of staff's first cause of action alleging that respondent violated 6 NYCRR § 325.7(a); and (ii) staff's second cause of action alleging a violation of ECL § 33-0905(5)(a), however, I find that the complaint fails to allege facts sufficient to support a viable cause of action, and I therefore recommend that the Commissioner deny staff's motion for default judgment with respect to those claims.

A. Claim Under ECL § 33-1301(8)

In the first cause of action, staff alleges that (i) "[r]espondent applied pesticides at the Commercial Property," Complaint, Tinsley Affirmation Attachment 1 ("Complaint"), ¶ 11; (ii) respondent "did not hold a commercial pesticide certification and was not a certified pesticide applicator," id. ¶ 12; and (iii) respondent "was not working under the direct supervision of a certified applicator … when pesticides were applied to the Commercial Property." Id. ¶ 13. Staff concludes that respondent "violated ECL § 33-1301.8 and 6 NYCRR Part 325.7(a) when pesticides were applied to the Commercial Property on or about September 10, 2015 through September 17, 2015 *without Respondent being a certified pesticide applicator or under the direct supervision of a certified applicator*." Complaint ¶ 14 (italics added).

Section 33-1301(8), states in relevant part that it is unlawful "[f]or any *person* to engage in the application of pesticides without a pesticide applicator certificate registration" (italics added). Section 33-0101(33) of the ECL defines "person" to include "any individual … corporation … or any other legal entity whatever." See also 6 NYCRR §325.1(au). Since a corporate entity may only act through people, a claim for unlawful application of pesticides may be asserted against a corporate entity such as respondent where one or more of its employees or other agents applies pesticides without a pesticide applicator certificate.

The allegations in the complaint, along with the affidavits and other documents submitted in support of the motion for default judgment, and inferences to be drawn therefrom, are sufficient to grant default judgment with respect to this claim. Service of the notice of hearing and complaint was addressed to "Jay Sacks, Ideal Management Services, LLC." Tinsley Affirmation, Ex. 2. The return receipt was signed, and the box marked "Agent" was checked. See id. Brayton Pendell, a Pesticide Control Specialist 1 in the Division of Materials Management at the Department's Region 4 office, stated in his affidavit that (i) respondent "is the property manager for" the property; (ii) he inspected the property and spoke with a resident who had made a complaint to the Department; (iii) on September 29, 2015, he "spoke with Jay Sacks of Ideal Management Services, LLC" by telephone; and (iv) "Mr. Sacks stated that … he applied pesticides for bed bug control purchased from Home Depot to the Commercial Property on at least two occasions; and [that] he did not have a pesticide applicator license." Affidavit of Brayton Pendell, sworn to February 17, 2016 ("Pendell Aff."), at ¶¶ 5, 7, 8, 10(a) and (b), respectively

The record is therefore sufficient, for purposes of a default motion, to find that Mr. Sacks, who does not have a pesticide applicator license, applied pesticides at the property as an employee or other agent of respondent. I therefore recommend that the Commissioner grant staff's motion for default judgment holding respondent liable for violating ECL § 33-1301(8).

B. Claim Under 6 NYCRR § 325.7(a)

In addition to alleging a violation of ECL § 33-1301(8), the first cause of action alleges that respondent violated 6 NYCRR § 325.7(a) when pesticides were applied at the site "*without Respondent being a certified pesticide applicator* or under the direct supervision of a certified applicator." Complaint ¶ 14 (italics added). The relevant statutes, regulations, and

Departmental web sites and forms, however, do not appear to contemplate that a corporate entity such as respondent – a limited liability company – can be a certified applicator. As discussed below, I recommend that the Commissioner deny staff's motion for a default judgment with respect to the claim that respondent violated 6 NYCRR § 325.7(a).

As discussed above, a corporate entity – which is a "person" under the statute – may be held liable when an uncertified employee or other agent applies pesticides on behalf of the entity. The prohibition in the cited regulation, however, is addressed to "individuals," not "persons." See 6 NYCRR § 325.7(a) (stating in relevant part that "[a]n *individual*" must not engage in the commercial application of pesticides … unless that *individual* is a certified applicator and possesses, *on their person*, a valid identification card" (italics added)).[1]

Moreover, "certified applicator" is defined in statute as "any *individual* who is certified to use or supervise the use of" pesticides. ECL § 33-0101(10) (italics added); see also 6 NYCRR § 325.8(a) ("*Commercial applicator*. An *individual* shall be eligible for commercial pesticide applicator certification in specific categories or subcategories….") (second italics added); 6 NYCRR § 325.1(k) (certification defined as "the recognition by the department that the *individual* has demonstrated competency and is therefore authorized to use or supervise the use of pesticides or sell restricted use pesticides"); see also http://www.dec.ny.gov/permits/45618.html#Commercial (Department web page discussing eligibility requirements an *individual* must meet to become a certified applicator, and providing information regarding pesticide applicator/technician certification, including requirement of photo identification on file with the Department of Motor Vehicles).

Respondent should be held liable under ECL § 33-1301(8) because it is a "person" (see ECL § 33-0101(33)) whose employee/agent Mr. Sacks applied pesticides without proper certification. Because the language of the related regulation – unlike the statute – is limited to "individuals" rather than "persons," however, respondent should not be held liable for violating the regulation.

C. Claim Under ECL § 33-0905(5)(a)

Staff's second cause of action alleges that respondent violated ECL § 33-0905(5)(a) when it failed "to provide product labels for the pesticides sprayed at the Commercial Property to the occupants of the Commercial Property." Complaint, ¶ 19. ECL § 33-0905(5)(a) requires each certified applicator, prior to applying a pesticide at a "dwelling,"[2] to

> supply the occupants therein with a copy of the *information*, including any warnings, *contained on the label* of the pesticide to be applied. Such information shall be supplied in either a written, digital or electronic format which shall be

[1] Given Mr. Sacks' admission to Mr. Pendell that Sacks applied pesticides at the site and was not a certified applicator, it is unclear why staff did not name Mr. Sacks as a respondent.

[2] "Dwelling" is defined as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place for one or two families." ECL § 33-0905(5)(d)(i). Staff misstates the citation as ECL § 33-0905(5)(b). See Complaint ¶ 17.

> determined by the occupants of such dwelling, provided however that the certified applicator must also have a written copy of such information in his/her possession.

ECL § 33-0905(5)(a) (italics added).

Given the language in the statute, I find that staff has not provided proof sufficient to support its claim for purposes of its motion for a default judgment. As the italicized portion of the quoted statute above reflects, the statute does not require that a certified applicator provide the actual product labels to dwelling occupants prior to application of the pesticides. Rather, the statute requires that the applicator provide the *information* that is contained in the label, and authorizes the applicator to provide such information in any of several ways. Staff alleges (and staff's witness states in his affidavit) only that respondent failed to provide product labels to occupants of the dwelling at the site. See Complaint, ¶ 18; Pendell Aff. ¶ 21. Such allegation, without more (such as an allegation, and assertion by a fact witness, that respondent failed to provide the required information in any of the other formats authorized by the statute) is insufficient to support the claim. See Matter of Gibson, Order of the Commissioner, July 5, 2016, at 2.

I therefore recommend that the Commissioner deny staff's motion for default judgment with respect to the second cause of action.

III. Civil Penalty

ECL § 71-2907(1) provides for a penalty of up to $5,000 for a first violation of "any provision of [ECL] article 33 … or any rule, regulation or order issued thereunder," and up to $10,000 for each subsequent offense. Staff seeks a penalty of $2,000, comprised of (i) $1,000 for the violations of ECL § 33-1301(8) and 6 NYCRR § 325.7(a); and (ii) $1,000 for the violation of ECL § 33-0905(5). See Pendell Aff. ¶¶ 24-26. In determining the requested penalty, staff utilized the Department's Civil Penalty Policy (DEE-1, June 20, 1990) and Pesticide Enforcement Policy (DEE-12, Rev. March 26, 1993). See id.; see also Tinsley Affirmation ¶ 12.

Because I am recommending that the Commissioner find liability on only one of the causes of action, I recommend that the Commissioner impose a civil penalty of $1,000, which amount is, on this record, authorized and appropriate.

IV. Remedial Relief

In addition to a finding of liability and the imposition of a civil penalty, staff requests that the Commissioner's order direct that respondent "shall no longer offer the service of commercial pesticide application unless he has complied with all applicable pesticide regulations and laws." See Complaint, Wherefore Clause, ¶¶ II; see also Tinsley Affirmation ¶ 13(d) (similar language but using the word "it" rather than "he").

Staff's request is unnecessary. Respondent is already required to comply with the ECL and relevant regulations. I therefore recommend that the Commissioner deny staff's request as unnecessary.

V. Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

A. Granting staff's motion for a default judgment with respect to the claim in the first cause of action that respondent violated ECL § 33-1301(8).

B. Otherwise denying staff's motion for a default judgment.

C. Holding that respondent violated ECL § 33-1301(8) as alleged in the first cause of action.

D. Imposing on respondent a civil penalty in the amount of one thousand dollars ($1,000), to be paid within thirty (30) days of service on respondent of the Commissioner's order.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: May 17, 2016
Albany, New York

APPENDIX A

Matter of Ideal Management Services, LLC
DEC File No. R4-2015-1117-133
Motion for Default Judgment

1. Cover letter dated February 17, 2016, addressed to the Chief Administrative Law Judge of the Department's Office of Hearings and Mediation Services, reflecting that respondent was also served with the motion papers.

2. Motion for Default Judgment, dated February 17, 2016

3. Affirmation of Dusty Renee Tinsley, dated February 17, 2016, with the following Attachments:

    (1) Cover letter, Notice of Hearing and Complaint, dated December 23, 2015

    (2) Certified mail return receipt No. 70150640000069002734

    (3) U.S. Postal Service tracking sheet for tracking No. 70150640000069002734, reflecting delivery on December 30, 2015

    (4) Affidavit of Service by Certified Mail Return Receipt, Jill Viscusi, sworn to February 10, 2016, attaching:

        a. Certified mail return receipt No. 70150640000069002734; and
        b. Cover letter, Notice of Hearing and Complaint, dated December 23, 2015

    (5) DEC Civil Penalty Policy, DEE-1, issued June 20, 1990

    (6) DEC Pesticide Enforcement Policy, DEE-12, revised March 26, 1993

    (7) Proposed Order

4. Affidavit of Brayton Pendell, dated February 17, 2016, with the following Attachments:

    (1) DEC Civil Penalty Policy, DEE-1, issued June 20, 1990

    (2) DEC Pesticide Enforcement Policy, DEE-12, revised March 26, 1993