STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Alleged Violations of Article 17 of the Environmental Conservation Law, Article 12 of the Navigation Law, and Title 17 of the New York Compilation of Codes, Rules and Regulations,

Ruling of the Administrative Law Judge

DEC File No. R2-20070419-180

- by -

LINDEN LATIMER HOLDINGS, LLC,

Respondent.
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Summary

By written motion dated July 19, 2007, staff of the New York State Department of Environmental Conservation (DEC or Department) requests that a default judgment be issued against Linden Latimer Holdings, LLC, pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). Staff maintains that Linden Latimer Holdings, LLC (Linden or respondent) defaulted in this matter by failing to file a timely answer to the staff's complaint.

Staff's motion should not be granted against respondent. As further explained below, the staff failed to adhere to the procedures for commencing an enforcement proceeding as set forth in 6 NYCRR § 622.3. While respondent's answer was served six days late, as described by the respondent's counsel in the opposing papers to staff's motion, there are reasonable grounds for the delay and no prejudice to the Department is incurred by denial of this motion.

Background

Department staff initiated this proceeding by service of a complaint dated June 13, 2007 by certified mail. The copy of the return receipt annexed to Assistant Regional Attorney John Urda's affirmation as Exhibit C indicates that the complaint was received by the respondent on June 14, 2007. Department staff served the notice of hearing dated June 19, 2007 by certified mail and this document was received by the respondent on June 20, 2007. See, Exhibit E annexed to Urda Aff.

In the complaint, staff alleges that property located at 32-35 Linden Place, Flushing, New York (the site) contains three 4,000-gallon underground storage tanks. See, complaint, ¶¶ 3-4. The complaint provides that respondent took title to this property on January 31, 2007. Id., ¶ 3.[1] Staff states in the complaint that an oil spill on this site was reported to the Department on November 25, 1997. Id., ¶ 5.

Staff alleges in its complaint that the oil spill has "impacted soil and groundwater" and "despite repeated attempts by Department staff to obtain Linden Latimer's compliance . . . ," the respondent has failed to remediate the site and it remains contaminated. Complaint, ¶ 5. Staff alleges that the respondent has discharged petroleum into the waters of the state in contravention of water quality standards in violation of Environmental Conservation Law (ECL) § 17-0301, 17-0501, and 17-0807 and Navigation Law (NL) § 173 and the respondent has failed to undertake containment of the prohibited discharge in violation of NL § 176 and 17 NYCRR § 32.5. Id., ¶¶ 14-16, 22.

By notice of motion for default judgment and order dated July 19, 2007, Assistant Regional Attorney Urda has moved for a default against the respondent including a demand for a penalty of $75,000. In its notice of motion for default judgment and order, the staff provides that the respondent has failed to serve a timely answer. Urda Aff., ¶ 13. On July 27, 2007, the OHMS received respondent's opposition to staff's motion that includes its "Not Guilty Answer" dated July 16, 2007. See, Exhibit A annexed to affirmation of Xian Feng Zou, Esq. According to the attorney's affirmation of Mr. Zou submitted in support of respondent's opposition, the answer was served upon the Department staff on July 16, 2007. Zou Aff., ¶ 12. In addition, an affidavit of service annexed to the answer provides that Mr. John Chen served the answer on July 16, 2007.

Discussion

Section 622.15(b) of 6 NYCRR provides that a motion for default judgment must contain:

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[1] The complaint refers to a deed and a DEC spill report as annexed as Exhibits A and B respectively. However, neither of these documents are annexed to the pleading submitted to the Office of Hearings and Mediation Services (OHMS).

(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.

Staff has provided proof of service of the notice of hearing and complaint upon the respondent. The difficulty is that these documents were served on separate occasions – the complaint was served on June 14 and the notice of hearing on June 20, 2007. Section 622.3 of 6 NYCRR requires that an enforcement proceeding be commenced by both a notice of hearing and complaint or by other methods that do not apply in this instance. Therefore, it is arguable that staff failed to commence this proceeding because it did not serve the notice of hearing and complaint simultaneously. This would not be an unreasonable conclusion because the notice of hearing provides vital information for the respondent such as identifying the entity that will set the hearing, asserting the requirement to include affirmative defenses in the answer or waive them, and warning that the failure to answer or attend a pre-hearing conference will result in a default and waiver of the respondent's right to a hearing. 6 NYCRR § 622.3(a)(2). At the very least, I must conclude that until the notice of hearing was served upon the respondent, staff did not fulfill the requirements sufficiently to commence this proceeding.

The staff failed to note in its moving papers that the respondent served an answer or to provide any detail as to why it was untimely. Attorney Zou states in his affirmation that he made several efforts to contact Assistant Regional Attorney Urda during the week of July 9 in order to "ascertain the proper procedure to respond . . ." but was unable to reach Mr. Urda and left messages. Zou Aff., ¶ 7. Mr. Zou details two additional efforts to get a response from the Department staff on July 12 and 13, 2007, respectively. Id., ¶¶ 8-9. He also affirms that Mr. Urda did contact his office on July 16, 2007 leaving word that the respondent was in default and therefore the pre-hearing conference was canceled. Id., ¶11.

It is respondent's position that the answer was timely filed on July 16, 2007 noting that 6 NYCRR § 622.4 requires that an answer be served within 20 days of service of both the notice of hearing and complaint. Zou Aff., ¶ 16. Attorney Zou calculates

that 6 NYCRR § 622.6(b) adds five days to this period. Id., ¶¶ 17-18.

While I agree that the twenty-day time period to answer began to run on June 20, 2007, it concluded on July 10 not July 16. Section 622.2(b) is inapplicable because 6 NYCRR § 622.4(a) provides that the answer be served 20 days from receipt of the notice of hearing and complaint rather than from the date of the pleading. Thus, while staff did not provide any details of the lateness of respondent's service of the answer, it is clear that it was not timely.

Staff did provide a proposed order with its notice of motion and supporting papers.

Because the staff failed to serve the notice of hearing and complaint together, it is reasonable to find that this caused a confusing situation. Respondent's counsel has detailed his efforts to contact the Department staff to no avail until the deadline to answer had passed. While I can make no conclusions on the merits of the respondent's defense to this enforcement proceeding based upon the pleadings before me, I find the commencement of this matter sufficiently nonconforming with Part 622 to deny the staff's motion. Since 10 years have passed since the Department was notified of the oil spill, the respondent has had title since January of this year, and the answer was only 6 days late, it does not seem too onerous to have the matter decided on its merits. Section 622.4(a) of 6 NYCRR allows the administrative law judge to extend the time to answer and because I can see no prejudice to the Department caused by this short delay, I am denying the staff's motion.

Ruling

The motion for default judgment is denied.

/s/
Albany, New York
August 2, 2007

Helene G. Goldberger
Administrative Law Judge

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