STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

DEC Case No. R4-2007-1025152

- by -

GREG NIGRO,

Respondent.

The respondent, Greg Nigro, seeks to reopen the default judgment in this matter. He was charged with storing waste tires without a permit on his property at 2330 NY Route 67, Johnsonville, NY, in violation of 6 NYCRR 360-13.1.

The regulations provide that a motion to reopen a default judgment goes to the Administrative Law Judge (ALJ) assigned to the matter. 6 NYCRR 622.15(d). The ALJ prepares a report on the motion, and that report is sent to me for my consideration and issuance of a final order on the motion. See Matter of Dale Waite, Decision of the Commissioner, September 3, 1994 (1994 WL 549676). The ALJ's report on the motion is annexed to the final order on the motion. Id.

The legal standards that a party needs to satisfy on a motion to reopen a default judgment are set forth in 6 NYCRR 622.15(d) and CPLR 5015. Section 622.15(d) requires that the defaulting party demonstrate both good cause for the default and a likely existence of a meritorious defense. The legal standards set forth in CPLR 5015 are excusable default; newly-discovered evidence; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction; or reversal, modification, or vacatur of a prior judgment or order on which the default judgment is based.

Here, ALJ Garlick recommends in his report that I grant the motion to reopen. He concludes that Mr. Nigro has shown good cause for the default, i.e., that he may not have received the Notice of Hearing and Complaint. ALJ Garlick further concludes that Mr. Nigro raised factual issues regarding (1) his ability to pay a penalty and (2) the number of tires on his property, which would go to the calculation of the penalty, both of which can be

treated similar to a meritorious defense. See Matter of Dale Waite, Decision of the Commissioner, September 3, 1994 (1994 WL 549676).

I disagree with the ALJ that Mr. Nigro has rebutted the Department's prima facie showing of proper service of the Notice of Hearing and Complaint via certified mail with a return receipt requested. Based on the papers, a factual issue exists regarding service of the Notice of Hearing and Complaint via the certified mail process of the U.S. Postal Service, which requires a hearing to resolve.

Therefore, I direct the ALJ to schedule a hearing as soon as possible to explore Mr. Nigro's claim of improper service of the notice of hearing and complaint. The ALJ is to submit a report to me following that hearing, which I will consider for my final order on the respondent's motion to reopen.

Papers attached to this Order:

1. Report of ALJ Garlick on Motion to Reopen Default Order, dated July 13, 2009.

2. Order, dated November 10, 2008 (granting Motion for Default Judgment), with ALJ Default Summary Report, dated November 3, 2008.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Alexander B. Grannis
Commissioner

Dated: July 22, 2009
Albany, New York

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 27 of the Environmental Conservation Law and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

GREG NIGRO,

Respondent.

Report on Motion to Reopen Default Order

DEC Case No. R4-2007-10250152

Summary

This report recommends that the Commissioner reopen the default order in this case pursuant to section 622.15(d) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and direct a hearing be convened on the issue of civil penalty amount.

Proceedings

On November 10, 2008, Commissioner Alexander B. Grannis issued a default order pursuant to 6 NYCRR 622.15 to the respondent Greg Nigro. The order imposed, among other things, a $40,000 civil penalty, to be paid within 30 days of service, and required the respondent to remove and properly dispose of the 10,000 waste tires that DEC Staff estimated were on his property within 180 days of the order.

The Commissioner's order was personally served on the respondent on December 15, 2008.

On January 28, 2009, the respondent's counsel called me and requested a copy of my file and the next day I mailed it to him. Counsel also made a Freedom of Information Law (FOIL) request to DEC's Region 4 requesting materials related to this matter. DEC Staff made an initial response to this request on February 3, 2009.

By letter dated March 2, 2009, respondent's counsel wrote to me and requested that enforcement of the Commissioner's order be held in abeyance, pending a motion to reopen the default.

By letter dated March 5, 2009, DEC Staff wrote in opposition to respondent's counsel's request.

On March 26, 2009, respondent's counsel called DEC Staff and verbally amended his FOIL request to include law enforcement records. On April 9, 2009, DEC Staff telephoned respondent's counsel to report there were no documents in response to the pending FOIL request.[1]

By letter dated May 13, 2009, the Associate Commissioner for Hearings wrote to respondent's counsel informing him that DEC's Office of Hearings and Mediation Services (OHMS) did not have the authority to hold in abeyance the enforcement of a Commissioner's order, pending the receipt of a motion to reopen.

By papers dated May 18, 2009, respondent's counsel filed a notice of motion to reopen and/or vacate the default judgment with two affidavits: the first from the respondent; and the second from Jean Chura, a friend of the respondent.

DEC Staff opposed respondent's motion by papers dated May 26, 2009.

Respondent's counsel provided an unauthorized reply which was received on June 3, 2009.

This matter remains assigned to me and motions to reopen defaults are required to be made to the ALJ pursuant to 6 NYCRR 622.15(d).

Discussion

Motions for reopening a default judgment are addressed in 6 NYCRR 622.15(d):

> "(d) 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. 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".

[1] In his affidavit, the respondent indicates that he is still awaiting a response to his FOIL request, though DEC Staff indicates the FOIL request has been addressed.

Before addressing whether or not the respondent's motion meets this standard, DEC Staff makes two preliminary arguments.

First, DEC Staff argues that OHMS lacks the jurisdiction to entertain motions to reopen a default judgment or order and that the Commissioner's order is a final agency action that can only be addressed through an Article 78 proceeding in New York State Supreme Court. In his unauthorized reply, respondent's counsel disputes DEC Staff's claim. DEC Staff's argument is rejected based on the language of 6 NYCRR 622.15(d), quoted above. The first sentence of 6 NYCRR 622.15(d) clearly states that a motion to reopen a default (either before or after an order is issued) must be made to the ALJ. So the regulations authorize the ALJ to entertain motions to reopen defaults. The second sentence of 6 NYCRR 622.15(d) deals only with motions to reopen default judgments (or orders of the Commissioner). This sentence requires consideration of CPLR 5015, which states a court (or in this case the Commissioner) "which rendered a judgment or order may relieve a party from it upon such terms as may be just" upon any of five listed grounds, including excusable default which is the basis of the respondent's motion. Thus, only the Commissioner can grant (or deny) a motion to reopen a default order. The third sentence of 6 NYCRR 622.15(d) deals with defaults that occur before a Commissioner's order has been issued, such as failing to timely answer, and authorizes an ALJ to grant, or not, these motions. DEC Staff is correct that an ALJ could not reopen a Commissioner's order on default, without a second order of the Commissioner. However, the motion to reopen the default order is properly made to the ALJ who then makes a recommendation to the Commissioner.

Second, DEC Staff argues that respondent's papers are deficient as a matter of law. DEC Staff argues that the respondent's papers fail to meet the standards of 6 NYCRR 622.6(c)(2) which states that:

> "(2) Every motion must clearly state its objective and the facts upon which it is based and may present legal argument in support of the motion."

DEC Staff argues that the respondent's papers fail to identify the relief sought. This argument is also rejected. The respondent's papers, while not perfectly clear, state that the papers are a "request to reopen and/or vacate the default judgment and order of the Department in this matter."

Good Cause for the Default

The good cause for the default cited by the respondent is that he never received a copy of the notice of hearing and complaint. According to DEC Staff member Kathleen Fabrey's affidavit of service included with DEC Staff's motion for default judgment, Ms. Fabrey mailed the notice of hearing and complaint to the respondent and received the Domestic Return Receipt Card (green postcard) indicating delivery on March 20, 2008. Other information with DEC Staff's papers indicate that the item was delivered at 4:35 pm on March 20, 2008 in Johnsonville, NY 12094.

Attached to respondent's notice of motion is the affidavit of Jean Chura. Ms. Chura attests that when she picked up the mail from the respondent's post office box on March 20, 2008, the green card was with the mail. She signed the green card and placed it in the mail slot at the post office because the window was closed. At a later time, she was informed by a postal employee that the documents associated with the green card were no longer in the possession of the post office and that the green card would be discarded. Ms. Chura states she never received DEC Staff's papers. The green card was returned to DEC Staff, which retains possession of the card.

In response to the respondent's claim that he did not receive the notice of hearing and complaint, and therefore, did not know of this action, DEC Staff argues that its possession of the signed green card is prima facie evidence of completed service.[2] In its response, DEC Staff does not state whether or not the certified mail containing the notice of hearing and complaint was returned, unopened. Based on the above, the respondent rebuts and contradicts DEC Staff's prima facie evidence of service with the sworn statements of Ms. Chura. Based on Ms. Chura's statements and DEC Staff's silence regarding whether the certified mail was returned, it is reasonable to conclude that the respondent may not have received the notice of hearing and complaint in this action and has shown good cause for the default.

Meritorious Defense

The respondent cites three proposed defenses in his affidavit: (1) he was not responsible for the placement of the

[2] DEC Staff was not required to mail a copy of its default motion to the respondent in this case, nor did it send a courtesy copy of these papers.

tires on his property; (2) those responsible for placing tires on his property should be parties; and (3) that he does not have the financial ability to pay the fine or clean up the property.

First, the respondent states that when he purchased the property in 1996, he was advised by an unnamed DEC Environmental Conservation Officer that waste tires at the site, most of which had been there since the 1970s, were "grandfathered in." This is not a meritorious defense to the alleged violation of 6 NYCRR 360-13.1(b) which requires a permit to store more than 1,000 waste tires.

Second, the respondent argues that a neighbor had placed additional tires on the respondent's property and then called law enforcement officials as part of a personal vendetta. The respondent also claims that approximately half of the tires are actually on the property of a second neighbor. These claims do not show the likelihood of a meritorious defense for liability for the claimed violation of 6 NYCRR 360-13.1(b); however, DEC Staff member Forgea's justification for the $40,000 civil penalty in the default was based on $4 per tire ($4 per tire multiplied by 10,000 tires equals $40,000).[3] If only half as many tires are on the respondent's property as DEC Staff claims, this could impact the civil penalty amount. In addition, the intervention of a third party, if proven, could be relevant to the respondent's culpability.

Third, the respondent argues that he does not possess the financial ability to pay the fine and clean up the tires at the site. In his affidavit, the respondent states that his sole source of income is social security disability and that he is experiencing increasing medical costs due to his deteriorating health. DEC Staff argues that this alone is not adequate to reopen the default. The Commissioner has stated in the past, however, that a "claim concerning mitigating circumstances is relevant to the issue of penalties and can be considered in the same way a meritorious defense would be". (Matter of Dale Waite,

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[3] Mr. Forgea explains his rationale for the civil penalty, namely that the $4 per tire is a likely fee that the respondent would have received for the illegal disposal of the tire. Thus, the penalty amount is meant to remove any economic benefit a respondent may have accrued. In this case, according to his affidavit, the respondent purchased the property after a majority of the tires were placed on the property and the remainder were placed by a third party. This implies that the respondent accrued no economic benefit and raising a likely meritorious defense to DEC Staff's civil penalty request.

Decision of the Commissioner [September 3, 1994, WL 549676]). DEC's Civil Penalty Policy (DEE-1) includes consideration of a respondent's ability to pay in the determination of the amount of civil penalty appropriate in a case, and had the respondent been served and appeared, evidence of ability to pay would have been permitted.

The respondent has not shown in his motion the likelihood of a meritorious defense to liability for the alleged violation. Nowhere in his moving affidavit of merits does he claim that less than 1,000 tires exist on his property. Nevertheless, he has raised factual issues regarding the number of tires on his property and his ability to pay. Because DEC Staff used the estimated number of tires as the basis for their civil penalty calculation, the respondent has raised the likelihood of a meritorious defense to the civil penalty calculation and, if the defense is proven, could warrant a lowering of the civil penalty imposed. It has been held that courts can vacate defaults in whole or part, and in cases such as this (where liability is not contested but damages are), a court can vacate the default judgment only to the extent of permitting a damages trial (Schutzer v. Berger, 40 AD2d 725 [2d Dept 1972]).

Given the strong public policy in favor of resolving cases on the merits, it is proper for the Commissioner to reopen the record and direct a hearing be convened on the issue of civil penalty amount.

Recommendation

I recommend that the Commissioner issue an order finding that the respondent has rebutted DEC Staff's prima facie evidence of service of the notice of hearing and complaint and presented the likelihood of a meritorious defense with respect to civil penalty amount. The Commissioner should find that the respondent has met the standard for reopening a default found in 6 NYCRR 622.15(d) and the Commissioner should grant the respondent's motion to reopen the default order with respect to civil penalty amount and direct a hearing be convened on the issue of civil penalty amount.

/s/

Dated: Albany, New York
July 13, 2009

P. Nicholas Garlick
Administrative Law Judge