NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 33 of the Environmental Conservation Law of the State of New York (ECL) and Parts 320 through 329 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by	Ruling on Respondent's Motion to Dismiss the Complaint
Salvatore Volpe, Jr., doing business as Salvatore Volpe Landscaping 16 Collins Avenue Deer Park, New York 11729	DEC Case No. CO1-20070125-5
Respondent.	

October 19, 2007

Proceedings

Staff from the New York State Department of Environmental Conservation (Department staff) initiated the captioned administrative enforcement action with service of notices of hearing and pre-hearing conference, and a complaint, dated April 12, 2007, upon Salvatore Volpe, Jr., doing business as Salvatore Volpe Landscaping (Respondent). The notices of hearing and pre-hearing conference advised Respondent that he had 20 days from receiving the April 12, 2007 complaint to file an answer. The notices of hearing and pre-hearing conference also scheduled a pre-hearing conference for 2:00 p.m. on Thursday, May 24, 2007 at the Department's Region 1 Office on the SUNY Stony Brook Campus. The date to file an answer was extended by stipulation, and Fred Grafstein, Esq. (Deer Park, New York), filed an answer dated July 23, 2007 on behalf of Respondent.

Subsequently, with a cover letter dated September 4, 2007, Mr. Grafstein, filed a motion to dismiss the complaint concerning the captioned matter. Upon receipt of Respondent's motion, the matter was assigned to the undersigned Administrative Law Judge (ALJ). With a cover letter dated September 12, 2007, Alyce Gilbert, Esq., on behalf of Department staff, submitted a response opposing Respondent's motion to dismiss. Mr. Grafstein filed a reply affirmation with a cover letter dated September 12, 2007.

In a letter dated October 5, 2007, I identified the motion papers that the parties had filed by that date. I also noted that pursuant to 6 NYCRR 622.6(c)(3), further responsive pleadings are not allowed without the permission of the ALJ. I

accepted Mr. Grafstein's September 12, 2007 reply affirmation, even though he had not obtained leave prior to submitting it. In addition, I provided Department staff with the opportunity to submit a sur-reply by October 17, 2007. With a cover letter dated October 10, 2007, Department staff filed a sur-reply.

The Department's Charges

In the April 12, 2007 complaint, Department staff asserts seven separate charges. The charges relate to alleged violations of ECL article 33 (Pesticides) and implementing regulations at 6 NYCRR part 325 (Application of Pesticides). First, Staff alleges that Respondent violated ECL 33-0907, ECL 33-1301(8-a) and 6 NYCRR 325.23 by operating a pesticide business without business registration authorization in Deer Park, Town of Babylon, Suffolk County, from April 1, 2005 through December 31, 2005, and at 30 Rustic Gates Lane, Dix Hills, Town of Huntington, Suffolk County, on June 13, 2006.

Second, Staff alleges that Respondent violated ECL 33-0905, ECL 33-1301(8) and 6 NYCRR 325.7(a) by commercially applying pesticides without an applicator certification in Deer Park from April 1, 2005 through December 31, 2005, and at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

Third, Staff alleges that Respondent violated ECL 33-0905(5)(a) when he applied pesticides without an applicator certification and without providing the occupants of a dwelling with a written copy of the information, including any warnings, contained on the label of the pesticide in Deer Park from April 1, 2005 through December 31, 2005, and at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

Fourth, Staff alleges that Respondent violated ECL 33-1001 by failing to enter into a written contract with the owner of the property or his agent prior to any commercial lawn application from April 1, 2004 through December 31, 2004, and from April 1, 2005 through December 31, 2005, as well as at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

Fifth, Staff alleges that Respondent violated ECL 33-1205(1) and 6 NYCRR 325.25 when he failed to maintain use records for each pesticide applied in Deer Park from April 1, 2004 through December 31, 2004, and from April 1, 2005 through December 31, 2005, as well as at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

Sixth, Department staff alleges that Respondent violated ECL 33-1003 and 6 NYCRR 325.40(h) when he did not use visual notification markers in conformance with the Department's specification at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

Seventh, Staff alleges that Respondent violated ECL 33-1301(1)(b) by transporting pesticides in an unlabeled, alternative pesticide container at 30 Rustic Gates Lane, Dix Hills on June 13, 2006.

For these alleged violations, Department staff requests a total civil penalty of $15,500.

Respondent's Answer

Respondent filed an answer dated July 23, 2007 in which he generally denies the charges alleged in the April 12, 2007 complaint. Respondent asserts two affirmative defenses. First, Respondent asserts that Department staff should have issued a warning of any alleged violation pursuant to ECL 71-2907, and did not. Second, Respondent asserts that the April 12, 2007 complaint fails to state a cause of action upon which the relief sought can be granted. Based on these affirmative defenses, Respondent requests that the Commissioner dismiss the charges alleged in the complaint.

Respondent's Motion to Dismiss, and September 12, 2007 Reply Affirmation

With a cover letter dated September 4, 2007, Respondent's counsel filed a notice of motion to dismiss the complaint dated August 31, 2007 and an affirmation dated the same. With his notice of motion, Respondent provided copies of Department staff's April 12, 2007 notices of hearing and pre-hearing conference as well as the complaint of the same date, and his answer dated July 23, 2007. In his notice of motion, Respondent contends that the charges alleged in the Department's April 12, 2007 complaint should be dismissed for the following reasons.

First, Respondent cites Civil Practice Law and Rules (CPLR) § 3211(a)(8) in his notice of motion, and asserts that the Department "does not have jurisdiction over the person of the defendant." Respondent offers no further elaboration with respect to this assertion.

Second, in his notice of motion, Respondent argues that the April 12, 2007 complaint does not state a cause of action, and moves for dismissal of the April 12, 2007 complaint pursuant to CPLR 3211(a)(7). In his affirmation, Respondent clarifies the basis for his motion by asserting that the charges alleged in the complaint lack specificity. To support this assertion, Respondent refers to Specification C of Charge IV of the April 12, 2007 complaint. According to Respondent, this specification "assumes facts not plead and fails to allege that Respondent is subject to ECL 33-1001 at the time and place aforesaid." Respondent contends further that Charge IV is deficient because it does not allege that Respondent owns, operates or conducts a business subject to ECL 33-1001. Respondent argues that Charge III fails to plead sufficient facts to appraise Respondent of the alleged violation of ECL 33-0905(5)(a).

Finally, Respondent argues that he was "entitled to receive a notice/warning of the alleged first violation with a right to remedy the said violation" pursuant to ECL 71-2907. Referring to ECL 71-2907, Mr. Grafstein affirms that Staff never served Respondent with any notice or warning concerning any alleged violation of the pesticide statute and its implementing regulations. Absent any notice or warning, as required by ECL 71-2907, Respondent argues that Staff's failure to comply with this statutory requirement requires dismissal of the charges alleged in the April 12, 2007 complaint.

In his September 12, 2007 reply affirmation, Mr. Grafstein disputes the assertion made in Staff's September 12, 2007 response in opposition that Respondent's answer was untimely. According to Mr. Grafstein, the parties stipulated to July 30, 2007 as the return date for Respondent's answer, and Respondent filed his answer on or about July 24, 2007.

Respondent reiterated his position with respect to the requirement at ECL 71-2907 which, according to Respondent, requires Staff to provide written notice or warning of any alleged violations. Respondent maintains that Staff did not provide any warning.

Mr. Grafstein's September 12, 2007 reply affirmation is silent about Staff's request to amend the complaint pursuant to 6 NYCRR 622.5(b).

Department Staff's Response in Opposition, and Sur-reply

Department staff opposes Respondent's motion to dismiss the April 12, 2007 complaint. Staff replied to Respondent's motion to dismiss with an affirmation by Ms. Gilbert dated September 12, 2007. To support Staff's motion, Ms. Gilbert attached four exhibits to her affirmation. Exhibit A is a copy of the Department staff's April 12, 2007 notices of hearing and pre-hearing conference, and the complaint. Exhibit B is a copy of Respondent's July 23, 2007 answer. Exhibit C are copies of the signed domestic return receipts for the certified mailing, affidavits of service by Monica Hauck-Whealton, and the shipment request forms. Exhibit D is a copy of Respondent's August 31, 2007 motion papers.

Staff argues that each charge alleged in the April 12, 2007 complaint states a cause of action consistent with the requirements outlined in CPLR 3211(a)(7). Staff argues further that each charge alleged in the April 12, 2007 complaint is a concise statement of the matters asserted as required by 6 NYCRR 622.3(a)(iii).

Referring to CPLR 3026, Department staff contends that pleadings, such as those alleged in the April 12, 2007 complaint, should be liberally construed. For example, Staff argues that a liberal construction of the first cause of action gives notice to Respondent that a violation of a specific section of the ECL occurred, and that Respondent unlawfully operated a pesticide business without registration authorization. Referring to CPLR 3026 and to Professor Siegel's *New York Practice* (§ 208, at 328 [3d ed]), Staff asserts that defects in the pleadings may be ignored provided no substantial right of a party is prejudiced. Here, Staff observes that Respondent does not assert in his motion that he has been prejudiced. Staff observes further that Respondent did not move for a more definite statement to cure any perceived vagueness or ambiguities of the April 12, 2007 complaint. Staff argues further that if the assigned ALJ were to determine that the April 12, 2007 complaint failed to state a cause of action or was otherwise deficient, then Staff could move to amend the complaint, pursuant to 6 NYCRR 622.5, to cure any defects.

Staff responds to Respondent's assertion that the Department lacks personal jurisdiction over him pursuant to CPLR 3211(a)(8). According to Staff, Respondent's assertion is vague, and may be related either to a defect in service of the notices of hearing

and pre-hearing conference and the complaint, or to a deficiency in the complaint. Staff addresses both potential bases.

Citing 6 NYCRR 622.3(a)(3), Department staff argues that it served the April 12, 2007 notices of hearing and pre-hearing conference and the complaint upon Respondent by certified mail, return receipt requested. To support this argument, Staff points to the documents attached as Exhibit C to the response in opposition. As noted above, Exhibit C consists of the signed domestic return receipt for the certified mailing, affidavits of service by Monica Hauck-Whealton, and the shipment request forms. In her affidavits of service, Ms. Hauck-Whealton states that she served the April 12, 2007 notices of hearing and pre-hearing conference and the complaint upon Respondent by certified mail, return receipt requested. One set of papers was sent to Mr. Volpe and another set of papers was sent to Salvatore Volpe Landscaping. Mr. Volpe signed both domestic return receipt cards, which the US Postal Service returned the Department.

Subsequently, Respondent filed an answer dated July 23, 2007 in which he asserted two affirmative defenses. The first affirmative defense is that Staff failed to comply with ECL 71-2907 and issue warnings to Respondent prior to charging him with violations of ECL article 33 and its implementing regulations. The second affirmative defense is that the complaint fails to state a cause of action. Staff observes that these affirmative defenses do not include any assertion by Respondent that the Department failed to obtain personal jurisdiction over him (*see* CPLR 3015 and Siegel, *New York Practice*, §215, at 336 [3d ed]).

With respect to the second basis, Department staff acknowledges that the complaint does not contain a specific statement of the legal authority and jurisdiction as required by 6 NYCRR 622.3(a)(1)(i) and State Administrative Procedure Act (SAPA) § 301(2)(b).[1] Nevertheless, Staff maintains, first, that the reference to ECL 71-2907 in the notices of hearing and pre-hearing conference provides Respondent with sufficient notice that Staff is seeking to enforce ECL article 33 which regulates the sale and use of pesticides in New York State and, second, that the omission is harmless error and not fatal to the

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[1] Citing CPLR 3015, and referring to Professor Siegel's treatise (*New York Practice* §215, at 336 [3d ed]), Staff argues there is no requirement in New York practice to plead subject matter jurisdiction.

complaint. Staff notes that Respondent did not plead a lack of subject matter jurisdiction in his motion to dismiss.

In the alternative, Staff refers to 6 NYCRR 622.5(b) and requests leave to amend the complaint. Staff does not specifically state how it wishes to amend the complaint, however. Presumably, Staff would add a specific statement of the legal authority and jurisdiction as required by 6 NYCRR 622.3(a)(1)(i) and SAPA § 301(2)(b). Without further elaboration, Staff asserts that an amendment of the April 12, 2007 complaint would not prejudice Respondent.

Finally, Staff replies to Respondents claim that ECL 71-2907 requires Staff to provide written notice or a warning to Respondent prior to charging him with a violation of ECL article 33 and its implementing regulations. In the response in opposition, Staff provides an extensive quotation from ECL 71-2907(1). Staff identifies this statutory provision as the Neighbor Notification Law, formally known as Chapter 285 of the Laws of 2000, which amended ECL article 33 to add Sections 33-1004 and 33-1005. According to Staff, the statutory requirements were clarified in regulations at 6 NYCRR 325.41, and require applicators to provide 48 hour notice to neighboring property owners prior to the application of commercial lawn pesticides, among other things. In order for this statutory provision to apply, Staff explains further that county governments and New York City must adopt a local law to “opt into” the notice requirement. Staff states that Suffolk County is among the counties that have adopted local laws, and opted into the notice requirement. Because Respondent has been charged with violating neither ECL 33-1004 nor 6 NYCRR 325.41, Staff argues that the Respondent has no right to receive a notice or warning. Staff states further that enforcement of the Neighbor Notification Law rests with the local governments that have opted into the notice requirement provided by ECL 33-1004.

With a cover letter dated October 10, 2007, Department staff filed a sur-reply in the form of an affirmation of the same date by Ms. Gilbert. Staff does not dispute that Respondent filed his answer in a timely manner. In addition, Department staff maintains that the written warning provided for by ECL 71-2907(1) applies to violations of local laws, which are not at issue here because no charge alleged in the April 12, 2007 complaint asserts that Respondent violated any local law. Department staff states that the total maximum civil penalty associated with the charges alleged in the April 12, 2007 complaint is $135,000.

Discussion and Rulings

Personal Jurisdiction

SAPA article 3 (Adjudicatory Proceedings) provides authority for the conduct of administrative hearings such as the captioned matter. The procedures outlined in 6 NYCRR part 622 (Uniform Enforcement Hearing Procedures) rely, in part, on the statutory authority provided by SAPA article 3, and apply to the conduct of administrative enforcement proceedings brought pursuant to the Environmental Conservation Law (*see* 6 NYCRR 622.1[a][1]). Pursuant to 6 NYCRR 622.3(a)(1), Department staff may commence an administrative enforcement proceeding, such as the captioned matter, by serving a notice of hearing and a complaint.

Respondent's reliance on CPLR 3211(a)(8) as a basis to dismiss the complaint is without merit. As noted above, Department staff may commence an administrative enforcement action against a respondent with service of a notice of hearing and a complaint. Pursuant to 6 NYCRR 622.3(a)(3), service of the notice of hearing and complaint must be by personal service consistent with the CPLR, or by certified mail. Respondent's motion fails to assert that service of the April 12, 2007 notices of hearing and pre-hearing conference, and complaint was in a manner that was not consistent with the CPLR or was not served by certified mail.

With respect to the captioned matter, Department staff elected to commence the captioned matter with service of the April 12, 2007 notices of hearing and pre-hearing conference, and complaint by certified mail. Exhibit C to Staff's response in opposition is proof of service. Based on the information presented in Exhibit C and absence any further elaboration by Respondent in his motion, I conclude that Staff served the notices of hearing and pre-hearing conference, and complaint in a manner consistent with 6 NYCRR 622.3(a)(3). Consequently, the Department has obtained personal jurisdiction over Respondent. I note further that Respondent has appeared in this matter by answering the complaint, and that Respondent's answer does not raise an affirmative defense related to personal jurisdiction.

Sufficiency of the Complaint

SAPA § 301(2) requires reasonable notice of administrative hearings. The notice of hearing must include, among other things, a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction

under which the hearing is to be held; a reference to the particular sections of the statutes and rules involved, where possible; and a short and plain statement of matters asserted (*see* SAPA § 301[2][a], [b], [c], and [d]).

Pursuant to 6 NYCRR 622.3(a)(1), Department staff may commence an administrative enforcement proceeding by serving a notice of hearing and a complaint. The complaint must contain: (1) a statement of the legal authority and jurisdiction under which the hearing is to be held; (2) a reference to the particular sections of the statutes and rules involved, where possible; and (3) a short and plain statement of the matters asserted (*see* 6 NYCRR 622.3[a][1][i],[ii], and [iii]). The language of 6 NYCRR 622.3(a)(1) matches that of SAPA § 301(2).

With respect to the administrative forum, the Court of Appeals has determined that the alleged violations need only be reasonably specific, in light of all the relevant circumstances, to appraise the party of the charges alleged against him, and to allow for the preparation of an adequate defense (*see Matter of Block and Amback*, 73 NY2d 323, 333 [*citations omitted*]).

Respondent's concern is that the April 12, 2007 complaint lacks specificity. I disagree.

By Staff's own admission, the complaint does not include a statement of the legal authority and jurisdiction under which the hearing is to be held. Rather, the notices of hearing and pre-hearing conference dated April 12, 2007 provide the required references to SAPA article 3, ECL article 71 (Enforcement), and 6 NYCRR part 622. Given the statements of the legal authority and jurisdiction provided in the April 12, 2007 notices of hearing and pre-hearing conference and because Staff must serve both the notice of hearing and the complaint together upon a respondent (*see* 6 NYCRR 622.3[a][1]), I conclude that, with respect to the captioned matter, there is substantial compliance with the requirements outlined in the above referenced authorities including 6 NYCRR 622.3(a)(1)(i). Moreover, Respondent filed an answer and has asserted affirmative defenses. It can be reasonably inferred, consequently, that Staff's April 12, 2007 complaint was not so vague or ambiguous that he could not frame an answer (*see* 6 NYCRR 622.4[e]). Therefore, Department staff has identified the legal authority and jurisdiction under which the hearing will be held, and provided the requisite notice to Respondent.

Notice pursuant to ECL 71-2907

As noted above, Respondent argues that pursuant to ECL 71-2907, he was "entitled to receive a notice/warning of the alleged first violation with a right to remedy the said violation." According to Respondent, Staff never served him with any notice or warning concerning any alleged violation of the pesticide statute and its implementing regulations. Absence any notice or warning, as required by ECL 71-2907, Respondent argues that the charges alleged in the April 12, 2007 complaint should be dismissed.

Respondent's reliance on ECL 71-2907 as a basis for the dismissal of the charges alleged in the April 12, 2007 complaint is misplaced and without merit. In order to obtain the benefit of the written warning provided by ECL 71-2907(1), the following circumstances must be present. First, a county not contained entirely within a city may adopt a local law after a public hearing, pursuant to ECL 33-1004(1), that requires: (1) all retail establishments that sell general use pesticides for commercial or residential lawn application to display a sign consistent with standards outlined in ECL 33-1005(1); and (2) the person or business applying commercial lawn pesticides to supply written notice to the abutting property owners 48 hours prior the pesticide application. When multiple family dwellings are located on abutting properties, the local law must require the owners of those dwellings, or their agents, to supply written notice of the pending pesticide application to the residents of the multiple family dwellings.

Second, in instances when either pesticide applicators, or the abutting property owners of multiple family dwellings or their agents violate the local law by failing to provide notice of the pesticide application, ECL 71-2907(1) provides that the violator of the local law must receive a written warning for the first violation. For subsequent violations, violators will be liable for civil penalties.

With respect to the captioned matter, Staff neither references any local law duly adopted pursuant to ECL 33-1004 nor alleges that Respondent violated such a local law in the April 12, 2007 complaint. Moreover, Staff does not allege in the complaint that Respondent violated either ECL 33-1004 or 6 NYCRR 325.41.

This proceeding is not concerned with any issue related to a local law adopted by Suffolk County pursuant to ECL 33-1004, or any violation of ECL 33-1004 or 6 NYCRR 325.41. Consequently, the applicability of any written warning pursuant to ECL 71-2907 is beyond the scope of this proceeding.

Rulings

Based on the foregoing discussion, I rule as follows:

1. Staff served the April 12, 2007 notices of hearing and pre-hearing conference, and complaint in a manner consistent with 6 NYCRR 622.3(a)(3). Respondent has filed an answer. Therefore, Staff has obtained personal jurisdiction over Respondent for the purpose of the captioned enforcement matter.

2. Department staff's April 12, 2007 notices of hearing and pre-hearing conference, and complaint are consistent with the requirements outlined 6 NYCRR 622.3(a)(1). I conclude further that the complaint is not so vague or ambiguous that Respondent could not reasonably form an answer.

3. Based on the previous ruling, Department staff's request for leave to amend the April 12, 2007 complaint is now moot.

4. ECL 71-2907 does not apply to Charge III of the April 12, 2007 complaint because ECL 33-0905(5)(a) is not a local law adopted by Suffolk County pursuant to ECL 33-1004(1). Issues related to the written notice or warning outlined in ECL 71-2907 are beyond the scope of this proceeding. Accordingly, Respondent cannot rely on the first affirmative defense alleged in his July 23, 2007 answer, and it is dismissed.

5. Respondent's motion to dismiss the April 12, 2007 complaint is denied.

Further Proceedings

Department staff is directed to file a statement of readiness as required by 6 NYCRR 622.9 for the adjudicatory hearing concerning the captioned matter within 30 days from the date of this ruling. Staff is directed to provide Respondent's counsel with a copy of the statement of readiness at the same time that it is filed with me.

_____/s/_____
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Dated: Albany, New York
October 19, 2007

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