

In the Matter of Alleged Violations of
Article 12 of the New York State
Navigation Law and Title 17 of the
Official Compilation of Codes, Rules
and Regulations of the State of New
York ("NYCRR")

-by-

**SEAN WOODALL, BRANDI WOODALL,
DEODATH RAMCHARAN (a/k/a DAVID HAPPY)
and SUPER DEVELOPMENT CORP.,**

Respondents.

**RULING OF THE
ADMINISTRATIVE
LAW JUDGE**

NYSDEC File No.
R2-20101015-376

Background

In lieu of a notice of hearing and complaint, Staff of the Department of Environmental Conservation ("DEC") moved for an order without hearing against the respondents named above on October 19, 2010. Respondent Deodath Ramcharan, individually and as president of Super Development Corp., opposed the motion in papers dated November 9, 2010, which he sent to this office under a cover letter dated November 15, 2010.

DEC Staff counsel John K. Urda sent a letter dated November 22, 2010, requesting the assignment of an administrative law judge. In the letter, Mr. Urda wrote that respondents Sean and Brandi Woodall had not formally opposed the motion, but had been in contact with DEC Staff. Mr. Urda requested that a ruling as to the Woodalls be held in abeyance pending resolution of Staff's discussions with them.

On December 22, 2010, Mr. Urda forwarded a copy of a stipulation DEC Staff had executed that day with the Woodalls, and requested discontinuance of the action as against them.

Position of DEC Staff

DEC Staff alleges that respondents Sean and Brandi Woodall retained respondents Deodath Ramcharan and Super Development Corp. to conduct demolition and excavation activities at 552 Hinsdale Street, Brooklyn. Subsequently, on August 23, 2005, Staff says there was a fuel oil spill in the basement of 548 Hinsdale Street, an adjacent property, due to the separation of

a fill pipe from a 275-gallon aboveground tank. According to DEC Staff, the fill pipe (or supply line) ran through an outside wall along the property line shared with 552 Hinsdale Street.

DEC Staff maintains that the respondents caused the spill when demolition and excavation activities at 552 Hinsdale Street resulted in a three-inch separation of the outside wall of 548 Hinsdale Street, including the fuel supply line, from the floor of the building holding the fuel oil tank. Staff says that the separation forced the fill pipe apart from the tank, releasing the oil, which then leaked through a crack in the basement floor.

According to DEC Staff, the respondents illegally discharged petroleum at 548 Hinsdale Street, in violation of Navigation Law Section 173, and failed to immediately undertake containment of the petroleum discharge, in violation of Navigation Law Section 176 and Section 32.5 of Title 17 of the Codes, Rules and Regulations of the State of New York ("17 NYCRR 32.5"). The violations are alleged to have run daily from August 23, 2005, the date of the spill, to October 19, 2010, the date of Staff's motion.

DEC Staff alleges that the respondents failed to take immediate measures to address and contain the spill, and that the spill remains uninvestigated and unremediated. By way of relief, Staff requests an order imposing a total civil penalty of no less than \$10,000, and directing the respondents to fully investigate and remediate the discharge pursuant to a DEC-approved work plan.

Position of Respondents Deodath Ramcharan and Super Development Corp.

Respondents Deodath Ramcharan and Super Development Corp. deny DEC Staff's allegations. On the basis of an engineer's report attached to their response to Staff's motion, they say it appears that the petroleum discharge resulted from a loose fitting at the supply side of the oil tank at 548 Hinsdale Street, and had nothing to do with the excavation that they performed at 552 Hinsdale Street. Asserting that the excavation occurred four months before the discharge, they say that the discharge cannot be attributed to them, and that DEC has failed to consider other causes for it. They request that that the motion be dismissed, arguing that the matter cannot be decided without a hearing.

Discussion

DEC regulation provides that a contested motion for order without hearing will be granted if, upon all the papers and proof filed, a cause of action is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules ("CPLR"). On the other hand, the motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of facts sufficient to require a hearing. [See 6 NYCRR 622.12(d) and (e).]

CPLR 3212(b) states that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Summary judgment is granted sparingly and is inappropriate if there is any doubt regarding the existence of a triable fact on which liability is genuinely controverted.

In this case, summary judgment on behalf of DEC Staff would not be appropriate because there is a triable issue concerning the cause of the petroleum discharge that was reported on August 23, 2005. According to affidavits provided by DEC Staff, the fuel oil discharged when the respondents' demolition and excavation activities at 552 Hinsdale Street caused the outer wall of the house at 548 Hinsdale Street to separate from the house. According to Staff, the three-inch separation broke the connection between the aboveground tank and its supply line, releasing 275 gallons of oil which had been delivered the day before.

In his own affidavit, Mr. Ramcharan writes that the discharge cannot be attributed to him or his company, and must have been caused by someone or something else. He writes that four months passed between his excavation work and the discharge, and that there were no problems during that time. Hence, he argues, there could have been other causes for the discharge, and DEC had an obligation to consider these other causes but did not.

Mr. Ramcharan's papers include a three-page report prepared on his behalf by an engineer, Michael Drake, who says that on May 14, 2007, he conducted an inspection of the oil tank and foundation at 548 Hinsdale Street. Mr. Drake's report, dated June 14, 2007, and first received by DEC Staff on February 21, 2008, states that at the time of his inspection, the tank and its piping were in good condition, which indicates that the

excavation of the neighboring property, on April 20, 2005, did not exhibit forces large enough to have caused the supply side pipe to leak.

According to the account in Mr. Drake's report, 552 Hinsdale Street was excavated for a new house foundation and shoring was installed to protect the property at 548 Hinsdale Street. The shoring was exceeded by the excavation operator and the soil against and under the far rear corner of the house foundation at 548 Hinsdale Street subsided, or fell into the excavation hole. This in turn caused the far rear west side of the foundation to settle so that the wall leaned slightly outwards, in a local area on the rear wall only. The rear shift resulted in very minor cracks in the foundation wall, which went from the top of the foundation wall up the rear wall to the roof. This rear foundation was immediately braced up and backfilled to support the foundation properly on April 10, 2005.

Mr. Drake writes that between the excavation at 552 Hinsdale Street and the oil tank discharge at 548 Hinsdale Street, the occupants of 548 Hinsdale Street lived continuously in their residence using the oil-fired domestic hot water heater, which suggests to him that the excavation did not damage the tank. He also writes that during the four months between the excavation and the leak, the occupants of 548 Hinsdale Street were performing interior renovations, as documented by the New York City Building Department, and that this may have caused the oil leak.

In his affidavit attached to Staff's motion, DEC Staff member Raphael Ketani, who investigated the discharge, writes that he reviewed Mr. Drake's report and disagrees strongly with its conclusions, which he finds to be based largely on hearsay and generally lacking credibility. He points out that the report is based on a site inspection that occurred almost two years after the spill, and misconstrues the events that took place at the time of the spill, which Mr. Ketani responded to a day after it occurred.

According to Mr. Ketani, Staff does not allege that the excavation caused the tank to move; instead, Staff alleges that the area of the floor containing the supply line was pulled by the wall separation that resulted from the excavation. Based on his own observation, Mr. Ketani maintains that the supply line pipe moved and, indeed, was bent in a manner and position consistent with being separated from the tank as a result of the separation of the wall of the house from the basement floor.

A hearing will provide DEC Staff and the respondents an opportunity to prove their respective theories about the petroleum discharge at 548 Hinsdale Street. Staff shall also be expected to present evidence to support its claim that the discharge continued throughout the period from August 23, 2005, when it was reported on DEC's spills hotline, to October 19, 2010, the date of Staff's motion. The respondents' engineer, Mr. Drake, says in his report that "[t]here is no denying there was an oil leak" on August 23, 2005, but according to the affidavit of Mr. Kentani, the oil tank was empty the following day, meaning that any discharge, at least from the tank, had already concluded. Also, while Staff counsel Urda's affirmation says the spill remains unremediated, DEC's spill response form contains an entry dated September 19, 2007, indicating that the property owner, Josephine Otoo, said that due to removal of a broken sewer line, she would have a construction company dig up as much of the oil-contaminated soil as it could, since she did not want to break up her new concrete floor once it was poured. There is no additional entry showing whether this work did occur or what else may have been done at the discharge location.

Finally, because the spill did not occur on property owned or controlled by the respondents, and because they were presumably unaware of it when it happened, Staff shall be expected to explain what the respondents were to do to contain it immediately. The respondents are charged with failing to undertake containment of the discharge for a period starting on August 23, 2005, the date the discharge occurred.

In his affidavit, Mr. Vought says that, upon returning to his office after his August 24, 2005, he sent letters to respondents Sean Woodall, Deodath Ramcharan and Super Development Corp. instructing each of their responsibility for the spill and its cleanup, and requiring, among other things, removal of contaminated soil, collection of soil and groundwater samples to confirm removal of contaminants, and sealing of the basement floor to prevent vapor migration into the house at 548 Hinsdale Street. He also says that none of them responded to his letter or performed any of the required work. Mr. Ketani says in his affidavit that on June 15, 2006, he sent another letter to Mr. Ramcharan at his office at Super Development Corp., informing him and the corporation of their liability for the spill, its investigation and cleanup, and requiring that certain investigatory and remedial activities be completed within one month. Despite that and other efforts to get action from Mr. Ramcharan, Mr. Ketani writes that up until the time of

Staff's motion, none of the respondents performed the required investigation and remediation of the spill.

In their recent stipulation with DEC Staff, the Woodalls, without admitting liability, agree to clean up and remove the discharge of petroleum by taking steps outlined in a corrective action plan attached to the stipulation. At the hearing, Staff shall be expected to explain how, if at all, that affects the relief sought from Mr. Ramcharan and Super Development Corp., which is that they too be directed to fully investigate and remediate the discharge pursuant to a DEC-approved work plan.

In his statement opposing Staff's motion, Mr. Ramcharan contends that the petroleum discharge was the subject of a separate action brought against him in the State courts in Kings County, and that the case was dismissed. However, his papers contain no determination or other documentation supporting these assertions. At the hearing, Mr. Ramcharan shall be expected to produce what documentation he has, and to explain its bearing on this matter.

Ruling

The motion for order without hearing is denied as to respondents Deodath Ramcharan and Super Development Corp. Pursuant to 6 NYCRR 622.12(e), the moving and responsive papers will be deemed the complaint and answer, respectively. A hearing in this matter will be held at DEC's Region 2 office in Long Island City on a date to be established with the parties.

In light of their recent stipulation with DEC Staff, this matter is discontinued as against the Woodalls. Should DEC Staff choose to exercise its right to pursue any claims against the Woodalls arising from this or any other matter, it shall bring a new, separate action. Consistent with Staff's request, the case caption shall be amended to remove the Woodalls, and they will not be copied on future correspondence, rulings or reports from this office.

Order of Disposition

After issuance of this ruling, I will contact the parties by telephone to schedule the hearing. The date, time and location of the hearing shall then be confirmed in writing.

Albany, New York
January 7, 2011

_____/s/_____
Edward Buhrmaster
Administrative Law Judge