State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON SUMMARY DECISION MOTION

OAL DKT. NO. ECE 08989-14
AGENCY DKT. NO. PEA 130001-032975

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SITE REMEDIATION COMPLIANCE AND ENFORCEMENT,

Petitioner,

v.

BERGEN AUTO AND POLIDORO PROPERTIES, LLC,

Respondents.

Yin Zhou, Deputy Attorney General, for petitioner Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Craig R. Weis, Esq., for respondent Polidoro Properties, LLC (Law Offices of Craig R. Weis, attorney)

Record Closed: October 15, 2015 Decided: November 13, 2015

BEFORE **GAIL M. COOKSON,** ALJ:

This matter was filed as an appeal by Polidoro Properties LLC (Polidoro or respondent) from an Administrative Order and Notice of Civil Administrative Penalty Assessments (AONOCAPA) issued by petitioner New Jersey Department of

Environmental Protection (NJDEP) on or about February 14, 2014, alleging that Bergen Auto, which is located at 160 North Washington Avenue, Bergenfield Borough, Bergen County, otherwise known as Block 85, Lot 8 on the tax maps of Bergenfield (Property or Site) is contaminated with hazardous substances that were discharged to the land and waters and for which certain persons or entities are strictly liable to remediate pursuant to the Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11b and N.J.A.C. 7:1E-5.7(a)2ii, as set forth in more detail below. Polidoro, as the current owner of the Site, responded to the AONOCAPA and requested an administrative hearing on or about March 28, 2014.

This matter was transmitted by the NJDEP to the Office of Administrative Law (OAL) on July 16, 2014, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to me on July 22, 2014. I convened a case management conference telephonically on August 20, 2014, at which time counsel for respondent provided an update on the prior owner and responsible party, his death, and the lack of financial resources in the estate. It was confirmed that a Licensed Site Remediation Professional (LSRP) had been hired but that Polidoro had not had time to conduct further due diligence. All parties to the conference agreed to reconvene in two months. Another case management conference was held on October 21, 2014, at which time the property's financial and remediation status were discussed. Hearing dates were set for April 13 and 14, 2015, but additional discussions were to be held on potential settlement of the AONOCAPA.

Petitioner NJDEP submitted a Notice of Motion for Summary Decision and Brief with attachments in support under cover of March 16, 2015. However, soon thereafter, the Deputy Attorney General for petitioner advised that additional time was needed to take further consideration of possible settlement terms and conditions. On or about April 29, 2015, he advised that a proposed settlement would not be acted upon by the agency and the motion should be considered re-activated. After reminders to respondent that no responsive papers had even been submitted, I convened another telephonic conference on September 14, 2015. Respondent requested an additional month to decide whether a position on the motion would be taken. Because of the

reality of a foreclosure proceeding against the Property, respondent's counsel advised that it would not be submitting a response and was taking no position on the NJDEP's motion because the client could not afford to present a position. Accordingly, the motion is now ripe for determination.

MOTION UNDER CONSIDERATION

NJDEP moves for summary disposition on the AONOCAPA on the grounds that the facts are not in dispute and that the NJDEP is entitled to an order affirming the penalties assessed in the amount of $59,600. It argues that liability has been established through undisputed facts. It further argues that the penalties assessed in the AONOCAPA was an appropriate exercise of the NJDEP's discretion and that the respondent Polidoro must be ordered to comply with the affirmative obligations of the AONOCAPAs.

FACTUAL DISCUSSION

Based upon the papers submitted, I **FIND** the following undisputed **FACTS**:

1. Robert Hikade owned the Site from on or about April 22, 1997, until on or about March 27, 2003, when it was sold to Polidoro.

2. Hikade operated regulated Underground Storage Tank (UST) systems at the Site from April 22, 1997, until on or about February 8, 1999, when the USTs were closed.

3. The Estate of Robert Hikade, Sr. (Estate) previously conducted remedial activities at the Property. The Estate's consultant, GZA GeoEnvironmental, Inc. (GZA), submitted to the NJDEP a UST Closure Report, dated April 19, 1999. According to the Closure Report, a geophysical survey of the Property revealed magnetic anomalies suggesting that USTs were still present at the Property. [Exhibit A to Certification of David Rubin (Rubin Cert.)]

4. According to the UST Closure Report, in or around November 1998, soil borings were installed at the Property. The borings showed elevated organic vapor meter readings, which measure the presence of volatile organic compounds. Many of the compounds contained in gasoline are volatile organic compounds.

5. According to the UST Closure Report, groundwater samples were collected from temporary well points near the USTs. The results of the sampling revealed the presence of benzene, toluene, xylene (jointly BTEX), and naphthalene, hazardous substances under the Spill Act, above the NJDEP's applicable Ground Water Quality Standards.

6. According to the UST Closure Report, the Estate excavated a 1,000-gallon gasoline UST and a portion of another UST from the Property. A 275-gallon waste oil tank was also abandoned in place.

7. On or about December 2, 1998, GZA notified the NJDEP of a discharge of hazardous substances at the Property. [Rubin Cert., Exhibit B]

8. On or about November 2, 2000, GZA submitted to the NJDEP the result of soil and groundwater sampling conducted at the Property in July 2000 and August 2000. The soil sampling revealed BTEX contamination above the applicable Impact to Ground Water Soil Cleanup Criteria. The groundwater sampling revealed BTEX contamination several orders of magnitude greater than the applicable Ground Water Quality Standards. [Rubin Cert., Exhibit C]

9. On or about June 7, 2002, GZA submitted to the NJDEP a Remedial Investigation and Soil Remediation Report ("2002 Report"). The report documented the excavation and removal of 572.16 tons of contaminated soil from the Property. Post-excavation sampling of ground water revealed the continued presence of BTEX in concentrations above the applicable Ground Water Quality Standards. The Estate requested that the NJDEP issue a No Further Action (NFA) determination for soil at the Property. [Rubin Cert., Exhibit D]

10. The NJDEP responded to the 2002 Report by letter dated July 8, 2002. The NJDEP informed the Estate that the agency's approval of an NFA for soils at the Property would depend on results from the next several groundwater sampling events. Additionally, the NJDEP requested the submission of a Remedial Action Workplan on or before February 15, 2003. [Rubin Cert., Exhibit E]

11. GZA submitted to the NJDEP a Supplemental Remedial Investigation and Remedial Action Report dated June 7, 2004. According to the June 7, 2004, Report, GZA injected PermeOx® into the ground water at the Property as an interim remedial measure to reduce the concentration of BTEX in the ground water. That report on the groundwater sampling conducted after the PermeOx® injection indicated that BTEX levels had decreased from previous sampling events; however, BTEX and naphthalene remained in the ground water at the Property above the applicable Ground Water Quality Standards. [Rubin Cert., Exhibit F]

12. GZA submitted to the NJDEP a Biannual Groundwater Monitoring Report dated October 30, 2007. According to that report, the BTEX and naphthalene still remained in the ground water at the Property above the applicable Ground Water Quality Standards. [Rubin Cert., Exhibit G]

13. The NJDEP received a letter from Stephen Hikade, dated February 15, 2012, in response to a Compliance Assistance Alert letter from the Department dated January 30, 2012. Stephen Hikade explained that the Estate of Robert Hikade, Sr., had been closed and that Robert Hikade, Sr.'s son had recently passed away. However, an escrow had been assigned to Polidoro in 2003. Hikade directed that any further inquiries regarding the Property should be addressed to Polidoro. [Rubin Cert., Exhibit H]

14. Polidoro was incorporated in the State of New Jersey as a limited liability company on or about March 18, 2003, presumably in order to enter into the purchase agreement with Hikade.

15. In the AONOCAPA, the NJDEP cited the respondent for the following violations: failure to hire an LSRP, and submit to the NJDEP the name and license

information of the LSRP pursuant to N.J.A.C. 7:26C-2.3(a)1 and (a)2; failure to conduct the remediation without prior approval unless required in accordance with N.J.A.C. 7:26C-1.2(a), pursuant to N.J.A.C. 7:26C-2.3(a)3; failure to pay all applicable fees and oversight costs pursuant to N.J.A.C. 7:26C-2.3(a)4; and failure to conduct and submit an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.12(c). [Rubin Cert., Exhibit H]

16. NJDEP assessed a $15,000.00 penalty for the respondent's failure to hire an LSRP, and to provide the agency with the name and license of the LSRP and the scope of the remediation, in violation of N.J.A.C. 7:26C-2.3(a)1 and 2. In accordance with the regulatory penalty schedule and its discretion, the NJDEP assessed a $15,000.00 penalty (day 1 x $15,000.00 per day) for the first day that the respondent failed to hire an LSRP.

17. NJDEP assessed a $15,000.00 penalty for the respondent's failure to conduct the remediation in violation of N.J.A.C. 7:26C-2.3(a)3. In accordance with the regulatory penalty schedule and its discretion, the NJDEP assessed a $15,000.00 penalty (day 1 x $15,000.00 per day) for the first day that the respondent failed to conduct the remediation.

18. NJDEP assessed a $4,600.00 penalty for the respondent's failure to pay fees and oversight costs in violation of N.J.A.C. 7:26C-2.3(a)4. In accordance with the regulatory penalty schedule and its discretion, NJDEP assessed a $4,600.00 penalty (day 1 x $4,600.00, or the equivalent of one-hundred percent of the fees in arrears at the time the penalty was assessed) for the first day that the respondent failed to pay all applicable fees and oversight costs.

19. NJDEP assessed a $25,000.00 penalty for the respondent's failure to conduct and submit an initial receptor evaluation within the applicable timeframe in violation of N.J.A.C. 7:26E-1.12(c). In accordance with the regulatory penalty schedule and its discretion, NJDEP assessed a $25,000.00 penalty (day 1 x $25,000.00 per day)

for the first day that the respondent failed to conduct and submit the initial receptor evaluation.

20. Thus, the AONOCAPA assessed penalties against respondent in the total amount of $59,600.

21. It was asserted in the request for a hearing on the AONOCAPA by Polidoro that the contract for the sale of the Property provided for the seller to remediate the Site. [Rubin Cert., Exhibit K]

22. Respondent failed to hire an LSRP by the May 7, 2012, phase-in deadline for the LSRP program. Respondent did retain an LSRP on or about May 5, 2014, nearly three months after the NJDEP issued the AONOCAPA.

23. Respondent has failed to conduct the remediation pursuant to N.J.A.C. 7:26C-2.3(a)3.

24. Respondent failed to submit an initial receptor evaluation pursuant to N.J.A.C. 7:26E-1.12(c) when the NJDEP issued the AONOCAPA and has not done so to date.

25. Annual remediation fees assessed for the Property pursuant to N.J.A.C. 7:26C-4 were $4,600.00 for 2013 and $6,900.00 for 2014. To date, the respondent has not paid assessed annual remediation fees.

ANALYSIS AND CONCLUSIONS OF LAW

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." According to informal

representations of respondent's counsel, respondent cannot afford to defend the motion, the funds escrowed by the predecessor owner of the Property have been depleted, and the Property has been named in an action in foreclosure by its bank. Of course, a litigant cannot just "sit on his or her hands and still prevail" on a summary decision motion. Housel for Housel v. Theodoridis, 314 N.J. Super. 597, 604 n.3 (App. Div. 1998). As stated by the Court in Housel, the following well-established standard was still binding on parties even after Brill:

> [I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla . . . he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954).

It is also clear as a matter of law that liability for a violation of environmental protection statutes like the Spill Compensation and Control Act is imposed not on the basis of negligence but as a matter of strict liability. N.J.S.A. 58:10-23.11g(c). Subsection (c)(3) provides, in relevant part --

> In addition to the persons liable pursuant to this subsection, any person who owns real property acquired on or after September 14, 1993 on which there has been a discharge prior to the person's acquisition of that property and who knew or should have known that a hazardous substance had been discharged at the real property, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). Nothing in this paragraph shall be construed to alter liability of any person who acquired real property prior to September 14, 1993.

Thus, the NJDEP bears the burden only of proving the statutory violation. The landowner's or operator's intent to violate is not an essential element for these types of causes of action. See NJDEP v. Lewis, 215 N.J. Super. 564, 572–76 (App. Div. 1987).

In the present AONOCAPA, NJDEP determined that the Property's prior owner had commenced -- removed soil and injected PermeOx® into the ground water -- but not completed the remediation of hazardous discharge to soils and water on the Property, discovered after USTs were removed or abandoned in place. While respondent had a contract for the sale of the Property that kept the financial burden of the remediation on that seller, such would only create a private cause of action as between those two parties. N.J.S.A. 58:10-23.11f(a)(2)(a), and -23.11g(c)(3). It does not undermine the NJDEP's statutory responsibility to proceed in an administrative action against any responsible party. In this case, the agency proceeded herein against the current Site owner after the seller's escrowed environmental funds were depleted. Based upon the above recited facts, which were not contradicted by respondent, it cannot be disputed that there was a known discharge of hazardous substances at the Site.

In the AONOCAPA, NJDEP also exercised its discretion with respect to the level of penalties to be assessed, yet consistent with the penalty matrix. Respondent has been an owner of the Property for over ten years with full knowledge of what it had acquired, inclusive of the UST contamination.

> The Department may adjust the amount determined pursuant to (f), (g) and (h) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (f) above, on the basis of the following factors:
>
> 1. The compliance history of the violator;
>
> 2. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which the penalty is being assessed;
>
> i. Immediate implementation of measures to effectively

> mitigate the effects of the violation will result in a reduction to the bottom of the range.
>
> 3. The nature, timing and effectiveness of any measures taken by the violator to prevent future similar violations;
>
> i. Implementation of measures that can reasonably be expected to prevent a recurrence of the same type of violation will result in a reduction equal to the bottom of the range.
>
> 4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
>
> 5. Other specific circumstances of the violator or the violation.
>
> [N.J.A.C. 7:26-5.5(i)]

In this instance, NJDEP was lenient in assessing respondent for only "one day" under each of the potentially continuing violations. Such is certainly reasonable under all the circumstances and shall not be adjusted herein.

As stated above, respondent did not defend against the present application for summary decision. Accordingly, it is clear and I **CONCLUDE** as a matter of undisputed fact that respondent is liable for the full amount of the penalties assessed in the AONOCAPA in the total amount of $59,600; for the oversight fees in the total amount of $11,500 for 2013-2014; and for the costs and attendant regulatory obligations of remediating the Property to the statutory standards.

ORDER

For the reasons set forth above, the motion for summary disposition filed by the petitioner New Jersey Department of Environmental Protection is and the same is hereby **GRANTED** and the AONOCAPA with a total penalty assessment of $59,600 and total fees of $11,500 shall be **AFFIRMED**. It is further **ORDERED** that respondent Polidoro Properties LLC is also liable to complete remediation of the Site.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 13, 2015

Gail M. Cookson

DATE

GAIL M. COOKSON, ALJ
11/13/15

Date Received at Agency:

Mailed to Parties:
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