



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL WITHOUT

PREJUDICE

OAL DKT. NO. ECE 10927-20

AGENCY DKT. NO. PEA 150001-

U2413

**NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
SOLID WASTE COMPLIANCE AND
ENFORCEMENT,**

Petitioner,

v.

ANTONIO AND ARLEEN TODARO,

Respondents.

Paige A. Hensor, Deputy Attorney General, for petitioner (Matthew J. Platkin,
Attorney General of New Jersey, attorney)

David J. Singer, Esq., for respondents (Porzio, Bromberg & Newman, attorneys)

Record Closed: November 15, 2022

Decided: December 29, 2022

BEFORE TRICIA M. CALIGUIRE, ALJ:

STATEMENT OF THE CASE

Petitioner, the New Jersey Department of Environmental Protection, Bureau of Solid Waste Compliance and Enforcement (NJDEP), contends that respondents, Antonio and Arleen Todaro, have violated the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and/or the New Jersey Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., and the regulations promulgated thereto, N.J.A.C. 7:26-1.7(g)(1) and N.J.A.C. 7:26-2.8(f), in connection with the October 2010 deposit of fill materials, including demolition debris, on the property located at 207 Zion Road, Block 174, Lot 1.01, Hillsborough Township, New Jersey (the Site). NJDEP further contends that as the owners of the Site, respondents are the owners/operators of an unapproved Solid Waste Facility and are in violation of the above-referenced statutes and regulations for constructing and/or operating a Solid Waste Facility and accepting solid waste without a permit and are strictly liable for all cleanup and removal costs, oversight and other costs. The NJDEP seeks a civil administrative penalty of \$20,000.

PROCEDURAL HISTORY

On March 26, 2016, the NJDEP issued an Administrative Order and Notice of Civil Penalty Assessment (AONOCAPA) to respondent finding violations of the above statutes and regulations and requiring respondents to submit a compliance plan of action and to pay the assessed penalty. By letter dated April 6, 2016, respondents stated that they had not owned the Site since September 2014, did not permit any person to deposit fill at the Site, and were told by NJDEP staff that testing at the Site showed no violations. Respondents asked that the penalty be removed. By letter dated April 26, 2016, the NJDEP stated that it characterized respondents' letter as a request for an adjudicatory hearing and, on March 3, 2017, granted respondents' request. The parties participated in alternative dispute resolution, but did not resolve this matter and, on November 12, 2020, the NJDEP transmitted this matter to the Office of Administrative Law (OAL) 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.

An initial prehearing conference was held on February 10, 2021, during which respondents stated that they were retaining an attorney and the conference was rescheduled. The parties engaged in lengthy settlement negotiations but, as of November 2021, stated that settlement was not possible. After several status conferences, petitioner stated its intention to file a motion for summary decision and a briefing schedule was issued. On September 15, 2022, petitioner filed a motion for summary decision in its favor finding that respondent is liable for the violations of the Act and regulations alleged in the AONOCAPA and upholding the NJDEP's assessment of a civil administrative penalty of \$20,000 against respondent. On November 1, 2022, respondents filed a response in opposition to the motion for summary decision and cross-motion for summary decision in their favor. Petitioner replied on November 15, 2022, and the motions are now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

Based on the papers filed by the parties in this case, including the certifications of Paige A. Hensor, Deputy Attorney General; Thomas Farrell, NJDEP Bureau Chief, Bureau of Solid Waste Compliance and Enforcement; and respondent Antonio Todaro, I **FIND as FACT:**

At some time prior to 1997, a cabinet factory was operated on the Site. Certification of Thomas Farrell (September 15, 2022) (Farrell Cert.), ¶ 8.

At some time prior to November 25, 1997, HBL 174, LLC (HBL) was incorporated as a limited liability company. Certification of Antonio Todaro (October 31, 2022) (Todaro Cert.), Ex. A.

On November 25, 1997, HBL purchased the Site. Todaro Cert, Ex. A.

On or about October 12, 2010, the Somerset County Department of Health, Environmental Compliance Unit (County), received a report regarding the alleged dumping of construction materials at the Site. Two days later, a County field investigator visited the Site and reported "over 400 [cubic yards] of soil and historic fill material had

been brought to the site” and “at least 100 [cubic yards]” of the fill material was “asphalt chunks, brick, cinder block and road stone material[.] The historic fill had lots of coal and old trash items such as pottery, shells, shoes and bottles.” Ferrell Cert., Ex. A.

On April 14, 2014, the Township of Hillsborough Tax Collector sold the property to an unrelated third party. Ibid. On September 3, 2014, a final judgement of foreclosure was entered in favor of this third party, foreclosing the rights of HBL to possession of the Site. Ibid.

The factual issues in this case are (1) whether materials which meet the statutory definition of “solid waste” and/or “construction and demolition waste” were deposited on the Site; (2) whether the materials deposited on the Site meet the statutory definition of “clean fill”; (3) whether respondents owned the Site at the time solid waste was deposited; (4) whether respondents held a permit to construct and/or operate a Solid Waste Facility; and (5) whether respondents have any defenses to liability.

Respondents contend that the NJDEP “has no basis in law or fact” to have issued the AONOCAPA to respondents in their individual capacity as the Site was always owned by HBL and NJDEP has “failed to present any facts . . . to support the extraordinary measure of disregarding the corporate entity and imposing personal liability upon the [Todaros].” Ltr. Br. of Respondents in Opposition to Motion for Summary Decision and in Support of Cross-Motion for Summary Decision (October 31, 2022), at 1, 2.

LEGAL ANALYSIS AND CONCLUSIONS

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute. By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

The regulations provide that the decision sought by the movant “may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A motion for summary decision may only be granted where the moving party sustains the burden of proving “the absence of a genuine issue of material fact,” and all inferences of doubt are drawn against the movant. Judson, 17 N.J. at 74–75. Nevertheless, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Id. at 75. Although the pleadings may raise a factual issue, the question before the judge is whether those facts are “material” to the legal issues to be tried.

Summary decision is appropriate when “the evidence . . . is so one-sided that one party must prevail as a matter of law.” Brill, 142 N.J. at 541 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)]. In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits. In this case, the NJDEP bears the burden of proving by a preponderance of the credible evidence that respondents have violated the Act and Regulations. Respondents contend that there is a dispute as to their liability, if any, in their individual capacity and as to whether Antonio Todaro bears any liability as a responsible corporate officer. I agree and **CONCLUDE** that summary decision is not appropriate.

In short, the NJDEP issued the AONOCAPA against the respondents in their individual capacities as the owners of the Site and as the operators of an unapproved,

unpermitted solid waste facility. To prove ownership, NJDEP relies on the undated¹ responses to interrogatories prepared by Arleen Todaro in which she wrote as follows:

Question 2. State the time period that you owned the [Site].

Answer: Ownership of site location November 25, 1997 to September 3, 2014.

[Farrell Cert, Ex. C.]

Keeping in mind that Arleen Todaro did not have the benefit of counsel during much of this long proceeding, I note she also made the following statement, in pertinent part, in response to the same interrogatories:

Question 6. Regarding [this appeal], set forth specifically all facts upon which the Respondents will rely to establish that they are not liable[.]

Answer: The [AONOCAPA] is assessed against the individuals and the [Site] was owned by an LLC.

[Ibid.]

The above is not enough to prove that respondents owned or operated the Site at any time, especially when coupled with the undisputed fact that the Site was owned by HBL at all times.

NJDEP also claims that Antonio Todaro is a responsible corporate officer and therefore liable in his individual capacity, because:

[Antonio] Todaro is the only officer/member of [HBL and as such,] he has actual responsibility and control to direct the operations of and compliance actions of the company. Finally, [he] failed to prevent a violation by the company by securing the [Site] to prevent solid waste dumping [and] failed to correct

¹ Petitioner states that the answers to interrogatories were due on or about March 15, 2022, and there is no reason to question whether they were timely filed. The file in this matter reflects that counsel for respondents filed his appearance on August 31, 2022, and prior to that time, the Todoros appeared for all proceedings before me without counsel.

the violation by completing the required cleanup of the solid waste upon discovery of the violation.

[Br. in Support of Petitioner's Motion for Summary Decision (September 15, 2022), at 20–21.]

Nowhere in the AONOCAPA or the certifications does NJDEP allege facts regarding Antonio Todaro's role in HBL sufficient to support his liability as a responsible corporate officer.² While respondents concede that Antonio Todaro is a corporate officer of HBL, see Ltr. Br. of Respondents, at 7, they argue persuasively that petitioner has not shown that he may be held liable for the action, or inaction, of HBL. In State, Dept. of Env'tl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super 381, 402-03 (App. Div. 1995), the NJDEP was prevented from holding officers and directors of the corporation liable as there was no showing that they had "actual responsibility for the condition resulting in the violation or [were] in a position to prevent the occurrence of the violation but failed to do so[.]" It is not enough for Todaro to simply hold the position of an officer in HBL; he must have been "in control of the events that led to the violation." Id. at 403.

The NJDEP provides plenty of documents generated by Somerset County after the alleged dumping occurred, many of which describe meetings and/or conversations with the Todaros and with other persons allegedly involved in the alleged dumping. There is information in those documents which, if shown to be true, would tend to prove Antonio Todaro liable under Standard Tank. But the statements in those documents are all hearsay;³ there are no certifications from persons with first-hand knowledge of the events described in those documents. Petitioner has provided insufficient proof to obtain summary judgement and/or to hold either Arleen or Antonio Todaro liable for the violations described in the AONOCAPA.

² Petitioner claims that Antonio Todaro was the sole officer of HBL, but neither party provided any proof of his status as a member or officer, much less as the sole officer, including documents such as the certificate of formation. See Petitioner Br., at 20.

³ Hearsay is admissible in administrative proceedings but "some legally competent evidence must exist to support each ultimate finding of fact[.]" N.J.A.C.1:1-15.5.

For the reasons described above, I **CONCLUDE** that the AONOCAPA must be dismissed without prejudice and, if reissued, must name HBL 174, LLC, the corporate entity that owned the Site.⁴

ORDER

It is **ORDERED** that the application for summary decision of petitioner New Jersey Department of Environmental Protection is **DENIED** and the AONOCAPA issued by the petitioner is **DISMISSED WITHOUT PREJUDICE**.

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

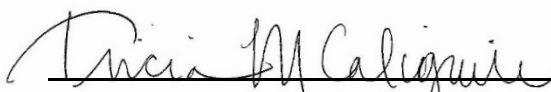
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

⁴ Should NJDEP reissue the AONOCAPA, there appears to be no basis for naming Arleen Todaro.

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.

December 29, 2022

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency:

Date Mailed to Parties:

TMC/nn