

STATE OF VERMONT

SUPERIOR COURT
Vermont Unit

ENVIRONMENTAL DIVISION
Docket No. 20-2-14 Vtec

ANR v. Ken Davis d/b/a Davis Contracting Service

ENTRY REGARDING MOTION

Title: Motion to Dismiss (Motion 1)
Filer: Ken Davis
Attorney: Pro se
Filed Date: March 24, 2014

Response filed on 04/07/2014 by Attorney John Zaikowski for Petitioner Agency of Natural Resources

The motion is DENIED.

So ordered.

This matter arises out of the alleged failure of Respondent Ken Davis, d/b/a Davis Contracting Service, to follow Acceptable Management Practices (AMPs) in connection with Respondent's logging activities on property in Montgomery, Vermont. On February 12, 2014, the Vermont Agency of Natural Resources (ANR or Agency) issued Respondent an Administrative Order (AO) alleging violations of the Vermont water pollution control law, 10 V.S.A. § 1259(a), as a result of his logging activities. The AO sets out numerous factual allegations describing Respondent's failure to follow multiple AMPs on several occasions, resulting in discharges into waters of the State without a permit. While the AO states that Respondent has since come into compliance and is following all AMPs, ANR seeks administrative penalties for the violations. On February 18, 2014, Respondent requested a hearing with this Court. Now before the Court is Respondent's "Motion to Dismiss for Lack of Prima Facie Case."

Rule 4(d) of the Vermont Rules for Environmental Court Proceedings (V.R.E.C.P.) governs the procedure for this Court's review of Administrative Orders. It requires ANR to file a pretrial memorandum, including a list of witnesses and a summary of any evidence it plans to present, within seven days of the request for a hearing. The Agency filed this memorandum on February 24, 2014.

Within 10 days of the filing of the Agency's pretrial memorandum, the respondent must file a memorandum that includes: the respondent's agreement or disagreement with the facts

described by the Agency in the AO; a list of witnesses and summary of the respondent's evidence; a statement "with particularity" as to whether the respondent accepts or contests each element of the order section of the AO; a summary of evidence related to penalties, if one was imposed; and the legal and jurisdictional issues which the respondent plans to raise. Respondent's memorandum, filed late on March 17, 2014, laid out the witnesses Respondent intended to call, but did not comply with the other requirements of V.R.E.C.P. 4(d)(4)(B)(ii).

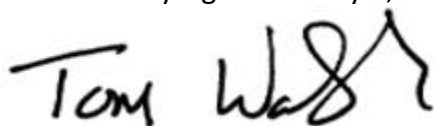
On March 24, 2014, Respondent filed the pending motion to dismiss. This motion is best characterized as a motion to dismiss for failure to state a claim upon which relief can be granted, as governed by Vermont Rule of Civil Procedure 12(b)(6). Civil Rule 12(b) does not apply to this Court's review of administrative orders. V.R.E.C.P. 4(a)(3). Here, however, giving Respondent some leeway as a pro se litigant, we consider the merits of his motion under the Court's authority to issue orders for the disposition of legal issues prior to the de novo hearing. V.R.E.C.P. 4(d)(4)(C).

This Court may only dismiss a claim when it is certain that there are no possible facts or circumstances that would allow relief for the claimant. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999) (citing *Amiot v. Ames*, 166 Vt. 288, 291 (1997)). To make this determination, we are directed to assume that all factual allegations made by the non-moving party are true and that all contravening assertions made by the moving party are false. *Id.* at 48–49. If materials outside the pleadings are considered, the motion may be converted into one for summary judgment subject to the standards of Civil Rule 56. V.R.C.P. 12(b). Under Civil Rule 56, a movant must show the absence of any genuine dispute of material fact and entitlement to judgment as a matter of law. V.R.C.P. 56(a). Because Respondent cannot meet either of these standards, his motion must be dismissed.

The Agency has alleged sufficient facts to create an issue for trial as to whether Respondent was in violation of the AMPs and whether failure to follow the AMPs resulted in discharges to State waters without a permit. Respondent's motion to dismiss rests primarily on an issue he raises in defense: that the discharges were caused by Hurricane Irene and not Respondent's failure to follow the AMPs. This assertion does not support dismissal of the action; rather, Respondent must present evidence of his compliance with the AMPs and the effects of Hurricane Irene at the de novo hearing.

Therefore, because Respondent has failed to establish sufficient legal grounds for dismissal of this administrative enforcement order, his motion to dismiss is **DENIED**.

Electronically signed on July 9, 2014 at 09:49 AM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division

Notifications:

John Zaikowski (ERN 4276), Attorney for Petitioner Agency of Natural Resources
Respondent Ken Davis