

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of:)

Kathryn Y. Lewis-Campbell)

Respondent)

) Docket No. TSCA-05-2009-0004
)
)
)

**ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION
ON LIABILITY AND APPROPRIATE PENALTY**

On February 9, 2009, Complainant initiated this proceeding by issuing a Complaint pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), as amended, 15 U.S.C. § 2615(a). The Complaint alleges that Respondent Kathryn Lewis-Campbell violated Section 409 of TSCA, 15 U.S.C. § 2689, and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLPHRA"), 42 U.S.C. § 4852d, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart F, which pertain to the disclosure of known lead-paint based and/or lead-based paint hazards upon the sale or lease of residential real property ("Disclosure Rule"). The Complaint alleges that Respondent violated the Disclosure Rule when, in September 2006, she entered into a Real Estate Purchase Agreement ("Agreement") to sell residential real property and failed, prior to the purchaser becoming obligated under the Agreement, to provide disclosures and obtain the purchaser's attestations concerning lead-based paint as required by the Rule. For the six violations alleged in the Complaint, Complainant proposed a penalty of \$ 43,238.¹ In her amended Answer dated April 22, 2009, Respondent denied every allegation in the Complaint, asserted that she lacked the ability to pay the proposed penalty, and raised a number of affirmative defenses.²

¹Since issuing the Complaint, Complainant has reevaluated its determination of an appropriate penalty to propose in this matter. Complainant now proposes a penalty of \$ 0. Thus, penalty is no longer an issue.

²Respondent asserted several arguments in defense, including that the Complaint failed to state a cause of action upon which relief may be granted; that Ohio Revised Code § 5302.30 does not give rise to a cause of action against Respondent; that the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. § 3545, does not subject Respondent to civil money penalties; and that Complainant's damages, if any, were caused or contributed to by the conduct of a third party over whom the Respondent had no control. However, Respondent has not raised these arguments in response to Complainant's Motion for Accelerated Decision, which is presently before the Court.

On August 8, 2009, subsequent to the parties' prehearing exchanges, Complainant filed a Motion for Accelerated Decision on Liability and Appropriate Penalty, which is presently before the Court. In its Motion, Complainant identifies portions of the record which, according to Complainant, demonstrate the absence of genuine issues of material fact as to Respondent's liability for the six counts of the Complaint. Complainant further asserts that Respondent raised one relevant issue in her prehearing exchange, that the property in question was not subject to the requirements of the Disclosure Rule at the time of sale due to the dilapidated condition of the house located on the property, and that this issue is a legal one that is appropriate for disposition by accelerated decision.

Respondent elaborated on this issue in her Brief opposing Complainant's Motion, filed on September 23, 2009, after the Court granted an extension of time for Respondent to file a response. Respondent contends that the property in question did not constitute residential real property as defined by RLPHRA,³ as the structure located on it was not occupied at the time of the sale, Respondent did not intend for it be occupied in its current uninhabitable condition, and the purchaser communicated to Respondent his intent to restore the structure before occupying it. As such, Respondent argues, the property is exempt from the requirements of the Disclosure Rule and she is not liable for the alleged violations of the Rule.

In its Reply filed on September 30, 2009, Complainant argues that Respondent failed to satisfy her burden to raise a genuine issue of material fact in her Brief and that, even if the Court accepts the unsupported statements made by Respondent, Complainant is still entitled to a finding that Respondent is liable as a matter of law.

The rules governing this proceeding, as set forth at 40 C.F.R. Part 22, provide that an Administrative Law Judge "may render an accelerated decision in favor of a party as to any or all parts of a proceeding...if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are similar to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and therefore, federal court rulings on such motions provide guidance to Administrative Law Judges (ALJs) adjudicating motions for accelerated decisions. *See, e.g., In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74 (EAB 2000). A party moving for summary judgment has the initial burden of showing the absence of any genuine issue of material fact by "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FRCP 56(c)). Upon such a showing, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response...must set forth specific facts showing there is a genuine issue for trial," and if it "does not so respond, summary judgment, if appropriate, shall be entered against [it]." FRCP 56(e). The non-moving party must demonstrate that the issue is "genuine" by referencing probative evidence in the record or by producing such

³ Pursuant to 42 U.S.C. § 4851b(24), residential real property is "real property on which there is situated one or more residential dwellings used or occupied, or intended to be used or occupied, in whole or in part, as the home or residence of one or more persons."

evidence. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-93 (EAB 1997).

Upon review of the evidence, “even if a district judge feels that summary judgment in a given case is technically proper, sound judicial policy and the proper exercise of the judicial discretion may prompt him to deny the motion and permit the case to be developed fully at trial.” *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979). The Supreme Court has recognized this feature of judicial discretion in the context of summary judgment rulings, stating that trial courts may “deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, ample authority exists to support the proposition that an ALJ may deny a motion for accelerated decision at his or her discretion and allow the case to be developed fully at hearing. See *In the Matter of 4 Seasons Cooperative*, EPA Docket No. FIFRA 08-2006-0001, 2006 EPA ALJ LEXIS 45, *12-13 (ALJ, Apr. 17, 2006). In other words, an ALJ is not obligated to grant an accelerated decision upon the exercise of its judicial discretion in a given case. *Id.* (citing *In re Franklin National Bank Securities Litigation*, 478 F.Supp. 210, 223 (E.D.N.Y. 1979) (“Satisfying the basic requirements of the rule for summary judgment does not guarantee that the motion will be granted.”)).

In its discretion in this matter, the Court DENIES Complainant’s Motion for Accelerated Decision in order to allow the case to be developed fully at hearing. The argument raised by Respondent presents an issue of first impression as to the scope of the Residential Lead-Based Paint Hazard Reduction Act of 1992, and therefore, it is premature to strike Respondent’s argument as being insufficient as a matter of law. Moreover, as an issue of first impression, it is important that the Court hear the testimony of witnesses as to the facts critical to this question of legal interpretation. This matter also raises questions of credibility, which can only be decided upon the presentation of evidence by witnesses at a hearing for the Court’s assessment of their testimony. For the foregoing reasons, the Court concludes that an evidentiary hearing is necessary. Pursuant to this Order, the hearing scheduled for October 27, 2009, and continuing, as necessary, through October 30, 2009, in Springfield, Ohio, will go forward.

So ordered.

William B. Moran by Jennifer Wozz
William B. Moran
United States Administrative Law Judge

Dated: October 8, 2009
Washington, D.C.

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Docket No. TSCA-05-2009-0004

CERTIFICATE OF SERVICE

I certify that a true copy of **Order Denying Complainant's Motion for Accelerated Decision on Liability and Appropriate Penalty**, dated October 8, 2009 was sent this day in the following manner to the addressees listed below:

Original and one copy by Pouch Mail to:

Ladawn Whitehead
Regional Hearing Clerk
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Knolyn Jones
Legal Staff Assistant

Dated: October 8, 2009