

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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PROTECTION AGENCY

Docket No. TSCA-05-2008-0019

_____)
_____)
_____)
Mardaph II, LLC; Mardaph III, LLC;)
and Vinnie Wilson;)
Cincinnati, Ohio)
Respondents.)
_____)

COMPLAINANT'S RESPONSE TO RESPONDNET'S MOTION

Pursuant to the Regional Judicial Officer's Order of March 19, 2009, Complainant United States Environmental Protection Agency (Complainant or U.S. EPA) herein files this response to Respondent Vinnie Wilson's Motion.

Summary

On August 4, 2008, U.S. EPA filed an administrative Complaint against the Respondents, including Respondent Vinnie Wilson, alleging 47 violations of the Toxic Substances Control Act (TSCA). The Complaint alleged, inter alia, that Respondent Vinnie Wilson as the owner and/or agent for the owner of rental units failed to provide its lessees with the required disclosures regarding the potential presence of lead-based paint and/or lead-based paint hazards. U.S. EPA sought a penalty against Respondent Vinnie Wilson of \$91,090. Though served with the Complaint, Respondent Vinnie Wilson failed to file an answer within 30 days of service. On January 22, 2009, U.S. EPA moved for the entry of a default order against Respondent.

On February 20, 2009, Respondent Vinnie Wilson filed a handwritten motion entitled "Motion for an Order Setting Aside a Motion for Default Judgment and/or in the Alternative,

Motion for an Evidentiary Default Hearing Before an Official Hearing Board Panel.” In her pray for relief in the motion, Respondent did not seek dismissal of the Complaint but sought setting aside the default judgment, which had not been entered, and/or an evidentiary hearing. On March 19, 2009, the Regional Judicial Officer, before whom Complainant’s Default Motion was pending, issued an order denying Complainant’s Motion for Default Judgment. The Regional Judicial Officer went on and, sua sponte, interpreted one paragraph in Respondent’s “affidavit” as a motion to dismiss the Complaint on the grounds it failed to state a claim upon which relief could be granted because the Complaint was not accompanied by the “required affidavit of verification.” The Regional Judicial Officer ordered the Complainant to respond to Respondent’s “Motion to Dismiss” by April 3, 2009.

Respondent’s “motion” is nothing more than a conclusory unsupported statement that has no basis in law and that on its face fails to meet the standard for dismissal of a complaint. The Complaint was filed pursuant to the authority delegated to the Complainant and conforms to the requirements of 40 C.F.R. Part 22. Thus, to the extent that the Respondent’s motion seeks dismissal of the Complaint, the motion should be denied.

ARGUMENT

The standard for dismissing a complaint for failure to state a claim upon which relief can be granted is high. As stated in, *In the Matter of: Housing Authority of the City of Moundsville, et al.*, CAA-03-2003-0211, 2004 EPA ALJ Lexis 6 (March 23, 2004), an administrative case regarding Clean Air violations:

Respondent CU's Motion to Dismiss is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under Section 12(b)(6) of the Federal Rules of Civil Procedure. The standards for deciding such a motion are well established. A complaint should not be dismissed for failure to state a claim

unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also*, *May v. Commissioner of Internal Revenue*, 752 F.2d 1301, 1303 (8th Cir. 1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). In reviewing the sufficiency of a complaint, "the allegations of plaintiffs' complaint must be assumed to be true, and further, must be construed in their favor." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *May v. Commissioner of Internal Revenue*, *supra*. Moreover, the threshold that a complaint must meet to survive a motion to dismiss for failure to state a claim is "exceedingly low." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985).

The Administrative Law Judge (ALJ) went on to deny the motion to dismiss in that case.

See also, *In the Matter of: The C.P. Hall Company*, TSCA-V-C-61-89, 1990 EPA RJO Lexis 11 (June 18, 1990)(ALJ cited 40 C.F.R. Section 22.20 as the general standard for a Motion to Dismiss and stated that such a motion is analogize to a FRCP 12(b) motion. The ALJ denied the motion to dismiss the complaint.)

As noted, on February 20, 2009, Respondent filed her handwritten motion, with accompanying exhibits. Respondent appeared pro se. Respondent's motion was a two page statement of a request for relief—setting aside the default and/or requesting a hearing. The motion was accompanied by a seven page handwritten "affidavit", that was not properly notarized, and six attachments. In Paragraph 10 of her "affidavit", Respondent makes the assertion that the Complaint failed to state a claim upon which relief can be granted because "said complaint was not verified by the required affidavit of verification of proof to verify the complaint requirements." Respondent cited no statute, regulation, case law, fact or any information to support this claim.

It is evident that the Complaint sets forth a claim upon which relief can be granted. Congress promulgated Section 1018 of Title X, the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. § 4851 *et seq.*, and Respondent raises no claim that Congress lacked the authority to pass this Act. Section 1018, 42 U.S.C. §4852d required the

U.S. EPA Administrator and the Secretary of the United States Department of Housing and Urban Development (HUD) to promulgate regulations for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease. On March 6, 1996, pursuant to 42 U.S.C. § 4852d, U.S. EPA and HUD promulgated regulations at 40 C.F.R. Part 745, Subpart F and 24 C.F.R. Part 35, Subpart A, known as, "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (Disclosure Rule). Pursuant to 40 C.F.R. § 745.102(b), owners of one to four residential dwellings must comply with the Disclosure Rule by December 6, 1996. 40 C.F.R. § 745.100 requires, among other things, that a seller or lessor of target housing complete the required disclosure activities before a purchaser or lessee is obligated under any contract to purchase or lease target housing. 40 C.F.R. § 745.113(b) requires that each contract to lease target housing include, as an attachment or within the contract, a lead warning statement as set forth in the regulations (40 C.F.R. § 745.113(b)(1)); a statement by the lessor disclosing the presence of any known lead-based paint and/or lead-based paint hazards or the lack of knowledge of such presence (40 C.F.R. § 745.113(b)(2)); a list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards in the target housing or a statement that no such records exist (40 C.F.R. § 745.113(b)(3)); a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (3) and the Lead Hazard Information Pamphlet required by 15 U.S.C. § 2696 (40 C.F.R. § 745.113(b)(4)); and signatures and dates of signatures of the lessor, agent, and lessee certifying the accuracy of their statements (40 C.F.R. § 745.113(b)(6)). Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failing to comply with the Disclosure Rule violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative civil penalties under Section 16 of TSCA, 15 U.S.C. § 2615(a), 40 C.F.R.

§ 745.118(f), and 42 U.S.C. § 4852d(b)(5). Section 1018(b)(5) of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), and 40 C.F.R. § 745.118(f), authorize the Administrator of U.S. EPA to assess a civil penalty under Section 16(a) of TSCA of up to \$10,000 for each violation of Section 409 of TSCA. U.S. EPA increased the maximum penalty to \$11,000 for each violation occurring after July 28, 1997. 40 C.F.R. § 745.118(f) and 40 C.F.R. Part 19. The authority to file a complaint for such violations was delegated to the Regional Administrators, *See Attachment A- May 11, 1994 Delegation 12-2-A*, and redelegated to the Director of the Land and Chemicals Division, *See Attachment B- October 22, 2007 Delegation 12-2-A/2-B*.

Based on an inspection conducted by HUD and U.S. EPA, information from the City of Cincinnati Department of Health, HUD and public records, on April 14, 2008, U.S. EPA issued a notice of intent to file a civil administrative action to Vinnie Wilson, Mardaph II, LLC and Mardaph III, LLC.¹ The letter informed the recipients that U.S. EPA would allege violations of Section 1018, 42 U.S.C. § 4852d, for lease transactions. On July 31, 2008, U.S. EPA filed an administrative Complaint against Vinnie Wilson, Mardaph II, LLC and Mardaph III, LLC. The Complaint alleged that: Respondent, Mardaph II, LLC owned residential rental property located at 711 Marion Road and 8750 Venus Drive, Cincinnati, Ohio and Respondent, Mardaph III, LLC owned residential rental property located at 2605 Fenton Avenue, 2637 Fenton Avenue,

¹ In Paragraph 11 of her affidavit, Respondent states that the Complaint “did not accrue and/or filed within one (1) year next after notice of intent to file an administrative action was taken 4/14/07 before the commencement of . . .” this action. There is no such requirement as the statute of limitation for the action alleged in the Complaint is not one year. Further, the notice of intent to file was sent on April 14, 2008 (see Exhibit 3 in Complainant’s Motion for Default Judgment) and the Complaint was filed August 4, 2008. So, even by the Respondent’s baseless argument, the Complaint was filed within one year of the notice of intent to file an administrative action.

2639 Fenton Avenue and 3341 McHenry Avenue, Cincinnati, Ohio. The Complaint further alleged that Respondent Vinnie Wilson owned residential rental property located at 1815 Clarion Avenue, 2636 Fenton Avenue, 4537 Lucerne Avenue, and 1530 Kinney Avenue, Cincinnati, Ohio. The Complaint further alleged that Respondent Vinnie Wilson managed all of the above Properties and was the agent of Respondents Mardaph II, LLC and Mardaph III, LLC. All of the residential rental properties referenced above were alleged to have been constructed prior to 1978 and thus were “target housing” as defined in 40 C.F.R. § 745.103. The Complaint further alleged that each Respondent offered and entered into leases for rental units in apartment buildings or single-family dwellings it owned or managed.

The Complaint alleged a total 47 violations of TSCA at ten residential rental units. There were five separate violations of TSCA: a failure to provide a lead warning statement, 40 C.F.R. § 745.113(b)(1); a failure to provide a statement disclosing either the presence of any known lead-based paint and/or lead-based paint hazards in the target housing, or a lack of knowledge of such presence, 40 C.F.R. § 745.113(b)(2); a failure to provide a list of any records or reports available to the lessor regarding lead-based paint and/or lead-based paint hazards in the target housing, or a statement that no such records existed, 40 C.F.R. § 745.113(b)(3); a failure to provide a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3), and the lead hazard information pamphlet required under 15 U.S.C. §2696, 40 C.F.R. § 745.113(b)(4); and a failure to have the signatures of the lessor, agent and the lessee certifying the accuracy of their statements to the best of their knowledge and the dates of such signatures before the lessee is obligated under the contract for the leasing transaction,

40 C.F.R § 745.113(b)(6). The Complaint alleged that Respondent Vinnie Wilson committed these violations as the owner of the rental units at 1815 Clarion Avenue, 2636 Fenton Avenue, 4537 Lucerne Avenue, and 1530 Kinney Avenue, Cincinnati, Ohio, and as the agent of Mardaph II, LLC and Mardaph III, LLC for the rental units at 711 Marion Road, 8750 Venus Drive, 2605 Fenton Avenue, 2637 Fenton Avenue, 2639 Fenton Avenue, and 3341 McHenry Avenue, Cincinnati, Ohio. These failures are violations of 40 C.F.R. § 745.113(b), 40 C.F.R. § 745.100, 42 U.S.C. § 4852d(b)(5), and Section 409 of TSCA, 15 U.S.C. § 2689.

Thus, the Complaint clearly and specifically sets forth the alleged violations, the statutory authority for each violation and the facts that support the alleged violations. Since for the purposes of a motion to dismiss, the allegations in the Complaint must be assumed to be true and must be construed in favor of the Complainant, the Complaint clearly sets forth a claim upon relief could be granted.

The “reason” that Respondent gives why the Complaint should be dismissed is because “said complaint was not verified by the required affidavit of verification of proof to verify the complaint requirements.” Respondent’s affidavit Paragraph 10. This nonsensical statement on its face has no meaning and is not a legal requirement.

40 C.F.R. Section 22.14 states that each administrative complaint filed under the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* shall include:

- 1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
- 2) Specific reference to each provision of the Act, implementing regulations, permit or order which Respondent is alleged to have violated;
- 3) A concise statement of the factual basis for each violation alleged;
- 4) A description of all relief sought;

- 5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;
- 6) The address for the Regional Hearing Clerk; and
- 7) Instruction for paying penalties.²

These requirements were all complied with in the Complaint. *See Attachment C, August 4, 2008 Complaint and Attachment D- Listing of Paragraphs in Complaint that meet the requirements of 40 C.F.R. Section 22.14.* There is simply no requirement for an affidavit verifying the statements in the Complaint. Thus, this clearly could not be a ground that to support a dismissal of the Complaint.³

CONCLUSION

Since the Complaint was issued under the authority delegated to the Director of the Land and Chemical Division of the U.S. EPA in Region 5, clearly and specifically sets forth the allegations against the Respondent and meets the requirements of 40 C.F.R. Section 22.14, the Complaint states a cause upon which relief may be granted. Respondent has failed to set forth any argument that would support dismissal of the Complaint. U.S. EPA therefore requests that the Regional Hearing Officer deny Respondent Vinnie Wilson's motion.

Submitted this 17th day of April 2009.



Peter Felitti
Assistant Regional Counsel
U.S. Environmental Protection Agency

² The requirements of Subpart I do not apply to this proceeding and so were not included.

³ Respondent raises other arguments such as excusable neglect for failing to respond to the Complaint and an inability to pay. These arguments, even if assumed to be true, would not warrant dismissal of the Complaint but, at best, may be a defense to liability or a factor to mitigate the penalty.

ATTACHMENTS

Attachment A- May 11, 1994 delegation

Attachment B- October 22, 2007 delegation

Attachment C- July 31, 2008 Complaint

Attachment D- Listing of Paragraphs in Complaint that meet the requirements of 40 C.F.R.
§22.14

Attachment E- Copy of cases cited


CERTIFICATE OF SERVICE

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I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, U.S. EPA, Region 5, and that true and correct copies were served on the Regional Hearing Officer and Respondent Vinnie Wilson Steel with delivery by first class mail on April 1, 2009 to:

Vinnie Wilson
7923 Rambler Place
Cincinnati, Ohio 45231
and
P.O. Box 317639
Cincinnati, Ohio 45231

Dated this 1st day of April 2009.



Peter Felitti
Assistant Regional Counsel
U.S. EPA, Region 5