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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

2009 APR 30 AM 11:44

In the Matter of:)
)
) Docket No. TSCA-05-2008-0019
)
Mardaph II, LLC, Mardaph III,)
LLC, and Vinnie Wilson,)
Cincinnati, Ohio)
)
)
Respondents.)
_____)

**ORDER DENYING RESPONDENT'S MOTION AND
AND REQUIRING RESPONDENT TO FILE ANSWER**

This is an administrative action alleging that Respondents Mardaph II, LLC, Mardaph III, LLC, and Vinnie Wilson violated the Toxic Substances Control Act ("TSCA"). Specifically, the Complaint alleges that the two corporations (as lessors) and Ms. Wilson (as the owner and/or agent for the owner of rental units) failed to provide its lessees with the required disclosures regarding the possible presence of lead paint.

No party has yet answered the Complaint. On January 22, 2008, Complainant moved for the entry of a default order against Respondent Vinnie Wilson. On February 27, 2009, Respondent Wilson filed a motion seeking that the "default judgment be set aside" (although no default judgment had been entered) and requested a hearing in this matter. She further argued that the Complaint should be dismissed because it was not accompanied by the "required affidavit of verification" and because it failed to state a claim upon which relief can be granted.¹ Complainant was ordered to respond to Respondent's motion to dismiss by April 3, 2009, and Respondent was permitted to file a reply thereto no later than April 20, 2009. Both parties have complied with those deadlines and I will now consider Respondent's motion to dismiss.

In its response to Respondent's motion, Complainant argues that the Complaint clearly and specifically sets forth the alleged violations, the statutory authority for each violation and the facts that support the alleged violations. I have reviewed the Complaint and agree with Complainant that it clearly sets forth a *prima facie* case and a right to relief on the basis of violations of the Lead-Based Paint Disclosure Rule (40 C.F.R. Part 745 Subpart F and 24 C.F.R. Part 35 Subpart A). Moreover, the Complaint fully complies with the pleading requirements of the Consolidated Rules of Practice which govern this action. See 40 C.F.R. § 22.14.

Respondent argues that the Complaint should be dismissed because it was not accompanied by the "required affidavit of verification" and cites to Federal Rule of Civil Procedure 23.1 for that requirement. That rule, however, is not applicable to this administrative action, which is governed by EPA's Consolidated Rules of Practice, not the Federal Rules of

¹ Respondent's motion also makes claims that could amount to defenses to this action or constitute factors to mitigate the penalty.

Procedure. Moreover, FRCP 23.1 applies to shareholder derivative suits which have no bearing on this administrative matter. Verification of a complaint is not required by the Consolidated Rules and does not provide a basis upon which to dismiss a complaint.

Respondent further argues that her motion to dismiss should be converted to a motion for summary judgment. I find no basis to do so, however, and note that even if Respondent's motion were considered under that standard, she has not established that there exists no genuine issue of material fact and that she is entitled to judgment as a matter of law.


For these reason, I conclude that Respondent's motion to dismiss is DENIED.

Respondent Wilson is now ORDERED to file an Answer to the Complaint in accordance with section 22.15 of the Consolidated Rules of Practice. Respondent is required to clearly and directly admit, deny or explain each of the factual allegations of the Complaint with respect to which she has any knowledge. Where she has no knowledge of a particular factual allegation, she should state as such, and the allegation will be deemed denied. The Consolidated Rules further require that Respondent's answer also state: the circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which she disputes; and the basis for opposing any proposed relief. Respondent has already stated that she requests a hearing and has set forth certain facts which could be considered a defense to this action or a reason to mitigate the proposed penalty.

Respondent shall file her Answer with the Regional Hearing Clerk on or before **May 22, 2009.**²

SO ORDERED.

Dated: April 30, 2009


Marcy A. Toney
Regional Judicial Officer

² A document is filed on the date it is received by the Regional Hearing Clerk. Thus, Respondent should allow sufficient time for her Answer to reach the Regional Hearing Clerk on or before May 22, 2009.

Respondent can file the original and one copy of her Answer with the Regional Hearing Clerk by mailing the response to the Clerk at this address: Regional Hearing Clerk (E-19J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. Respondent should serve a copy of her response on Complainant's counsel and can do so by mailing it to him: Peter Felitti, Assistant Regional Counsel (C-14J), U.S. EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604. Finally, Respondent should serve a copy on the Regional Judicial Officer: Marcy A. Toney, Regional Judicial Officer (C-14J), 77 West Jackson Boulevard, U.S. EPA Region 5, Chicago, IL 60604. Respondent can also serve her Answer by overnight mail, priority mail or by any reliable commercial delivery service. 40 C.F.R. § 22.5(b)(2).

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In the Matter of Mardaph II, LLC, Mardaph II, LLC, and Vinnie Wilson, Respondents.
Docket No. TSCA-05-2008-0019

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Respondent's Motion and Requiring Respondent to File Answer, dated April 30, 2009, was sent this day in the following manner:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5 (E-19J)
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy hand delivered to
Attorney for Complainant:

Peter Felitti
U. S. Environmental Protection
Agency, Region 5 (C-14J)
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by U.S. Mail to:

Ms. Vinnie Wilson
P.O. Box 317639
Cincinnati, Ohio 45231

Dated: _____

4/30/09

By: _____

Darlene Weatherspoon
Secretary