UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
MINOR RIDGE, L.P., d/b/a MINOR RIDGE APARTMENTS	)	**Docket No. TSCA-07-2003-0019**
RESPONDENT	)	

ORDER ON RESPONDENT'S MOTION TO DISMISS

Background

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On November 21, 2002, the United States Environmental Protection Agency, Region VII (the "EPA" or "Complainant") filed a Complaint against Minor Ridge, L.P. ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F, based on Respondent's alleged failure to provide an EPA-approved lead hazard information pamphlet to several lessees as required by 40 C.F.R. § 745.107(a)(1). Complainant seeks a civil penalty of $24,200 for these alleged violations. Respondent filed an Answer on January 13, 2003, admitting many of the factual allegations made in the Complaint while denying that such statements amounted to any violation of TSCA.

Along with its Answer, Respondent filed a Motion to Dismiss the United States Environmental Protection Agency's Complaint for Failure to State a Claim upon which relief can be granted ("Motion"). Respondent argues that it was not required to provide its lessees with a lead hazard information pamphlet because it met the exception in 40 C.F.R. § 745.101(b) for housing that has been found to be lead-based paint free by a

certified inspector.

Complainant filed a Response to Respondent's Motion to Dismiss ("Response") on February 26, 2003, arguing that the allegations in the Complaint establish a prima facie case for violations of TSCA and that Respondent is asserting an affirmative defense for which it bears the burdens of presentation and persuasion. Complainant also argues that an accelerated decision standard is more appropriate for adjudication of Respondent's Motion because it raises an affirmative defense, and that genuine issues of material fact still exist regarding whether the Section 745.101(b) exception should apply.

Respondent filed a Reply Brief in Support of its Motion to Dismiss ("Reply") on March 10, 2003, arguing that it is entitled to accelerated decision on its Motion because there are no genuine issues of material fact regarding its compliance with the requirements of the lead-based paint free exception in § 745.101(b).

Standard for Adjudicating a Motion to Dismiss

Respondent filed its Motion to Dismiss pursuant to Section 22.20(a) of the Rules of Practice, which provides that "[t]he Presiding Officer,[1] upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

A motion to dismiss under Section 22.20(a) is analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP").[2] *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, October 6,

[1] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. §§ 22.3(a), 22.21(a).

[2] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, February 24, 1993).

1993). It is well established that dismissal is warranted for failure to state a claim when "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Dry v. U.S.*, 235 F.3d 1249, 1252 (10th Cir. 2000). In reviewing the sufficiency of the complaint, the factual allegations made must be assumed to be true and all inferences must be drawn in favor of the plaintiff. *Schiever v. Rhodes*, 416 U.S. 232, 236 (1974); *Dry*, 235 F.3d at 1252. Accordingly, to prevail on its Motion, Respondent must show that Complainant's allegations, assumed to be true, do not prove a violation of TSCA as charged.

Discussion

In its Complaint, the EPA charges Respondent with five separate violations of 40 C.F.R. § 745.107(a)(1), which provides that before "the purchaser or lessee is obligated under any contract to purchase or lease target housing that is not otherwise an exempt transaction pursuant to §745.101...(1) The seller or lessor shall provide the purchaser or lessee with an EPA-approved lead hazard information pamphlet." EPA then sets forth several general factual allegations in support of its claim. Respondent is alleged to be a Missouri limited partnership (Complaint, ¶ 1) that owns and manages a residential apartment complex known as the Minor Ridge Apartments (Complaint, ¶ 3) which was constructed prior to 1978 (Complaint, ¶ 5) and meets the definition of "target housing" in 40 C.F.R. § 745.103 (Complaint, ¶ 6). For each count, the EPA alleges that Respondent, acting as a "lessor," entered into a rental agreement with a "lessee" without providing an EPA-approved lead hazard information pamphlet (Complaint, ¶¶ 7-41).

In its Answer and Motion to Dismiss, Respondent does not dispute the factual allegations made in the Complaint, but instead argues that it was not required to comply with the disclosure requirements of Part 745 because it fell within the exception for "leases of target housing that have been found to be lead-based paint free" by a certified inspector in 40 C.F.R. § 745.101(b). Respondent claims that as the EPA failed to allege that Respondent did not qualify for the Section 745.101(b) exception, a prima facie case has not been established and the Complaint fails to state a claim upon which relief can be granted.

However, the EPA correctly points out in its Response that Respondent's claim that it qualifies for an exception to the lead-based paint disclosure requirements is an affirmative defense and not part of the EPA's prima facie case. This is

based on the well-established rule that a party claiming the benefits of an exception to a statutory or regulatory prohibition bears the burden of proving that exception. *U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967); see *Johnson v. James Langley Operating Co.*, 226 F.3d 957, 963 n. 4 (8th Cir. 2000); *U.S. v. Eastern of New Jersey, Inc.*, 770 F.Supp. 964, 981-82 (D.N.J. 1991) (finding that defendant bears the burden of proving whether it meets the small quantity generator exception under 40 C.F.R. § 266.40(d)(2)); *In the Matter of Billy Yee*, Docket No. TSCA-7-99-0009, 1999 EPA ALJ LEXIS 88 at *12 (ALJ, November 8, 1999) (finding that § 745.101(b) is an affirmative defense for which the respondent bears the burden of proof), *aff'd*, TSCA Appeal No. 00-2, 2001 EPA App. LEXIS 13 (EAB, May 29, 2001), *appeal dismissed sub nom. Billy Yee v. EPA*, 2002 WL 87636 (8th Cir. 2002). Under Section 22.24 of the Rules of Practice, the "respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24.

Assuming all the facts alleged in the Complaint to be true, I find that the EPA has established a prima facie case that would entitle it to relief under the law governing this matter. That is, Respondent's failure to provide an EPA-approved lead hazard information pamphlet to named lessees constitutes violations of 40 C.F.R. § 745.107(a)(1) and Section 409 of TSCA. *See Billy Yee*, 1999 EPA ALJ LEXIS 88 at *8-10 (discussing the elements required to establish a violation of Section 745.107(a)(1)). Respondent cannot prevail on a motion to dismiss because the exception in Section 745.101(b) is not part of the EPA's prima facie case, but is an affirmative defense for which Respondent bears the burden of proof. *See* 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994) ("A true affirmative defense, which is avoiding in nature, raises matters outside the scope of the plaintiff's prima facie case").

Under such circumstances, the EPA correctly maintains that Respondent's Motion is more appropriately addressed under the standard for adjudicating a motion for accelerated decision rather than for a motion to dismiss. FRCP 12(b) ("If, on a motion...to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment..."); *see In re BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74 (EAB, April 5, 2000) (transforming a motion to dismiss that was supported by affidavits into a motion for accelerated decision); *In the Matter of Church & Dwight Co.*, Docket No. FIFRA-02-2001-5109, 2001 EPA ALJ LEXIS 179 at *3 (ALJ, November 16, 2001) (finding that Respondent's motion to dismiss, which turned on the

applicability of a regulatory exception that was not part of Complainant's prima facie case, was more appropriately addressed within the standard for adjudicating a motion for accelerated decision). In reviewing Respondent's Motion, I note that the standard for deciding a motion for accelerated decision is less stringent than the standard for a motion to dismiss.

Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, 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) (emphasis added).

As the EPA has noted, motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., BWX Technologies*, 9 E.A.D. at 74-5; *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, September 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the

Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the

opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[3]

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

Discussion

The Complaint alleges that Respondent has violated the disclosure requirements of 40 C.F.R. Part 745, Subpart F, by failing to provide an EPA-approved lead hazard information pamphlet to several lessees at the Minor Ridge Apartments, a complex owned and managed by Respondent. In its Motion,

[3] Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. *See* 40 C.F.R. §§ 22.4(c), 22.20, and 22.26.

Respondent argues that it was under no obligation to comply with the disclosure requirements because it met the exception in 40 C.F.R. § 745.101(b) for target housing that has been certified as lead-based paint free. Section 745.101(b) provides an exception to the requirements of Subpart F for:

> (b) Leases of target housing that have been found to be lead-based paint free by an inspector certified under the Federal certification program or under a federally accredited State or tribal certification program. Until a Federal certification program or federally accredited State certification program is in place within the State, inspectors shall be considered qualified to conduct an inspection for this purpose if they have received certification under any existing State or tribal inspector certification program.

Respondent claims that following the promulgation of Subpart F on March 6, 1996, it consulted the Missouri Department of Natural Resources for a list of state licensed lead inspectors and hired Albert E. Stewart of Stewart Industrial Hygiene & Safety, Inc. ("Stewart") to perform a lead-based paint inspection at the Minor Ridge Apartments. Motion, ¶¶ 6-8. After conducting a lead-based paint inspection, Stewart provided Respondent with laboratory results and a letter on November 6, 1996 stating that "ALL twenty-six (26) bulk samples analyzed for lead are below the limits as established by Misso[ur]i Statutes 701.300(7)(a) of 0.5 percent." Motion, Attachment D. In a subsequent letter dated January 14, 2002, Stewart asserted that the Minor Ridge Apartments are "LEAD FREE AS PER 24CFR 35.82(b) and 40CFR 745.101(b) as all samples were less then 0.5% by weight." Motion, Attachment E. Stewart also provided his inspector license number as "MO 9504492268492" and certified that the sampling of 10% of rental units, 4% of exteriors, and 4% of common space was the protocol established by Missouri Statute 701.300. Id. As a result of this inspection, Respondent argues that it qualifies for the Section 745.101(b) exception from the Title 40, Part 745, Subpart F disclosure requirements.

In its Response to the Motion, the EPA argues that Respondent has failed to demonstrate that its apartment complex was lead-based paint free because the 1996 inspection by Mr. Stewart was insufficient to satisfy the requirements of the Section 745.101(b) exception. Specifically, the EPA asserts that the November 6, 1996 letter failed to mention that the apartment complex was found to be free of lead-based paint, and that Stewart's January 14, 2002 letter stating that the Minor Ridge Apartments were "LEAD FREE AS PER 24CFR 35.82(b) and 40CFR

745.101(b)" was written after his license from the state of Missouri had expired.

Furthermore, the EPA alleges that Mr. Stewart did not follow the requisite sampling methodology for purposes of satisfying the lead-based paint free exception. In particular, the EPA submits that Stewart's sampling failed to follow the standards for the selection of units and surfaces to be tested set forth in Chapter 4 of "Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing" ("Interim Guidelines"), an April 18, 1990 publication of the Department of Housing and Urban Development that was a required training document for persons applying for a license to conduct lead inspections in Missouri. *See* Missouri Code of State Regulations, 19 CSR 20-8.010(4)(A)(3) (1995). The EPA has also included an affidavit from Lisa Schutzenhofer, the current Chief of the Bureau of Lead Licensing in the Missouri Department of Health and Senior Services, which states that Stewart's 1996 inspection "constituted a limited lead-based paint survey" and "fell far short of constituting an acceptable lead-based paint inspection of the apartment complex for purposes of determining whether the complex contained lead-based paint." Response, Exhibit 8.

In its Reply, Respondent argues that it fully complied with the Section 745.101(b) exception by receiving a finding from a state-certified inspector that its housing was lead-based paint free. Respondent alleges that the language in Stewart's 1996 letter meets the definition of "lead-based paint free housing" in 40 C.F.R. § 745.103, and that the EPA is seeking to add a new requirement to the exception by insisting that the letter state specifically that the apartment complex was "found to be lead-based paint free." Furthermore, Respondent argues that the exception did not require the use of any particular sampling protocol or method, including the Interim Guidelines, and holding Respondent liable for any shortcomings in the inspection process would violate its rights to due process.

Under the standard for adjudicating motions for accelerated decision, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of the non-movant. Although Respondent claims that it is not subject to the disclosure requirements of Subpart F due to the exception for lead-based paint free target housing under 40 C.F.R. § 745.101(b), there is a clear dispute between the parties as to whether this exception should apply. While no evidence has been presented alleging that Mr. Stewart was not certified by the state of Missouri at the time of the 1996

inspection, the parties have proffered conflicting evidence on the issue of whether the Minor Ridge Apartments were found to be lead-based paint free.

Accordingly, based on the record before me, I am compelled to find that genuine issues of material fact exist concerning Respondent's alleged liability under the lead-based paint disclosure requirements in 40 C.F.R. Part 745, Subpart F. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter, but have simply determined that Complainant has adequately raised genuine issues of fact for evidentiary hearing and that Respondent has not established that it is entitled to judgment as a matter of law. As such, Respondent's Motion to Dismiss must be denied.

Order

Respondent's Motion to Dismiss is DENIED.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: March 26, 2003
Washington, DC

In the Matter of Minor Ridge, L.P., d/b/a Minor Ridge Apartments, Respondent
Docket No. TSCA-07-2003-0019

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Dismiss**, dated March 26, 2003, was sent this day in the following Manner to the addrressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: March 26, 2002

Original and One Copy by Pouch Mail to:

Kathy Robinson
Regional Hearing Clerk
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

Copy By Pouch Mail to:

Michael Gieryic, Esquire
Assistant Regional Counsel
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

Copy By Regular Mail to:

Terry J. Satterlee, Esquire
Lathrop & Gage, L.C.
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108-2684