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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
BILLY YEE,	)	Docket No. TSCA-7-99-0009
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

I. Background

This proceeding was initiated by a Complaint dated February 4, 1999, issued by Complainant, Director of the Air, RCRA and Toxics Division, United States Environmental Protection Agency Region 7, pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), as amended, 15 U.S.C. § 2615(a). The Complaint charges Respondent, Billy Yee, with violating Section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745 Subpart F (the Disclosure Rule).(1) The Complaint alleges that Respondent violated the Disclosure Rule when he entered into a contract to lease an apartment and failed to provide to the lessee the disclosures concerning lead-based paint prior to the lessee becoming obligated under the lease contract. Six counts of violation are alleged, for which Complainant proposes a total penalty of $29,700.

On February 26, 1999, Respondent through an attorney filed an "Answer and Request for Hearing and Informal Settlement Conference" which set forth some defenses to the allegations of violation in the Complaint, but which failed to "clearly and directly admit, deny or explain each of the factual allegations contained in the

complaint," as required by the Rules of Practice, 40 C.F.R. § 22.15. By Initial Prehearing Order dated May 8, 1999, Respondent was ordered to file an amended answer complying with the requirements of 40 C.F.R. § 22.15 by May 28, 1999. Upon Respondent's failure to file an amended answer by that date, Respondent was ordered to show cause by June 17, 1999 as to such failure and as to why a default should not be entered against him. Upon substitution of counsel, Respondent filed an Amended Answer on June 10, 1999, and subsequently, on June 16, 1999, filed a Response to the Order to Show Cause.

Pursuant to a Prehearing Order, Complainant and Respondent each filed Prehearing Exchanges. On October 5, 1999, Complainant moved to supplement its Prehearing Exchange with two additional exhibits, and stated that Respondent does not object to the granting of Complainant's motion to supplement. On October 21, 1999, the parties filed a "1st Joint Set of Stipulated Facts, Exhibits and Testimony," (Stipulations). The hearing in this matter is scheduled to commence on December 14, 1999.

On October 8, 1999, Complainant filed a Motion for Partial Accelerated Decision as to Liability on all counts of the Complaint, on the basis that there are no genuine issues of material fact as to Respondent's liability and that Complainant is to judgment as a matter of law.[(2)] Complainant's counsel states in the Motion that he spoke with counsel for Respondent and that the latter indicated that Respondent objects to the granting of the relief sought in the Motion. However, to date, Respondent has not filed a written opposition to the Motion.

II. Discussion

The Rules of Practice, 40 C.F.R. Part 22, as amended, 64 Fed. Reg. 40176 (July 23, 1999), provide that a response to a motion must be filed within 15 days after service of the motion, and, where the motion is served by mail, five additional days are added to the 15 days. 40 C.F.R. § 22.7(c), 22.16(b). Therefore, under the Rules of Practice, Respondent's response to the Motion was due on October 28, 1999. The Rules of Practice provide further that "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Thus, Respondent's objection as expressed by Complainant in the Motion is waived by the failure of Respondent to submit a written response to the Motion. Nevertheless, Complainant's Motion must be analyzed on its merits.

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision under the Rules of Practice, 40 C.F.R. § 22.20. *Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.,* 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact, "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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 Fed. R. Civ. Proc. 56(c) . Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial," and if it "does not so respond, summary judgment, if appropriate, shall be entered against [it]." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company,* EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery,* 6 E.A.D. 782, 793 (EAB 1997). Federal courts are not obligated upon motion for summary judgment "to sift though the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 916 n. 7 (5th Cir. 1992); *L.S. Heath & Son, Inc., v. AT&T Information Systems,*

Inc. 9 F.3d 561, 567 (7 Cir. 1993). However, the record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990).

Complainant alleges violations of the Disclosure Rule based upon a contract ("Contract") to lease a residential property ("Property"), constructed prior to 1978, to Ms. Karen Lovett ("Lessee"). The Disclosure Rule concerns the sale or lease of "target housing," which is defined as housing constructed prior to 1978, and requires a lessor of target housing to disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards, provide available records and reports, provide a lead hazard information pamphlet, and attach specific disclosures and warning language to the leasing contract before the lessee is obligated under a contract to lease target housing. 40 C.F.R. §§ 745.100, 745.103, 745.107, 745.113(b). The Complaint alleges the Respondent failed to comply with those requirements.

Specifically, the Complaint alleges the following six counts of violations of the regulations and of Section 409 of TSCA:

1. that Respondent did not provide an EPA-approved lead hazard information pamphlet to Lessee prior to her being obligated under the rental Contract as required by 40 C.F.R § 745.107(a)(1);

2. that Respondent did not include, either as an attachment to or within the rental Contract a lead warning statement as required by 40 C.F.R. § 745.113(b)(1);

3. that Respondent did not include, either as an attachment to or within the rental Contract a statement disclosing Respondent's knowledge of the presence of lead-based paint and/or lead based paint hazards in the Property or indicating that Respondent had no such knowledge, as required by 40 C.F.R. § 745.113(b)(2);

4. that Respondent did not include, either as an attachment to or within the rental Contract, a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the Property that have been provided to the Lessee, or an indication that no such records or reports are available, as required by 40 C.F.R § 745.113(b)(3);

5. that Respondent did not include, either as an attachment to or within the rental Contract, a statement by Lessee affirming her receipt of the information required by 40 C.F.R. § 745.113(b(2) and (3) and the lead hazard information pamphlet required under 40 C.F.R. § 745.107(a)(1), as required by 40 C.F.R. § 745.113(b)(4); and

6. that Respondent did not include, either as an attachment to or within the rental Contract, the signatures of the Respondent and Lessee, certifying to the accuracy of their statements. as required by 40 C.F.R. § 745.113(b)(6).

Complainant asserts in its Motion that Respondent in its Amended Answer admits each of the elements necessary to prove a violation in each of the six counts cited in the Complaint. Indeed, the parties have stipulated that "Complainant has established all facts needed to find liability for all six counts of the Complaint unless successfully rebutted by Respondent's affirmative defenses." Stipulations, dated October 21, 1999, ¶ 1. Specifically, the parties stipulated that Respondent owned the Property, that it was constructed prior to 1978 and is "target housing" as defined by 40 C.F.R. § 745.103, that on or about November 1, 1997, Respondent entered into the Contract with Karen Lovett for the rental of the Property for residential use, that Respondent became a "lessor" and Karen Lovett became a "lessee" as those terms are defined by 40 C.F.R. § 745.103, that Lessee and her children moved onto the Property, that Respondent did not provide an EPA-approved lead hazard information pamphlet to Lessee prior to her being obligated under the Contract, that Respondent did not include a lead warning statement with the language contained in 40 C.F.R. § 745.113(b)(1), that Respondent did not include a statement disclosing Respondent's knowledge of the presence of lead-based paint or lead-based paint hazards in the Property or indicating that Respondent had no such knowledge, that Respondent did not include a list of any records or reports

available to Respondent pertaining to lead-based paint and/or lead based paint hazards in the Property or an indication that no such records or reports were available, that Respondent did not include a statement by Lessee affirming her receipt of the information described by 40 C.F.R. § 745.113(b)(2) and (3) and the pamphlet described by Section 745.107(a)(1), and that Respondent did not include the signatures of the Respondent and Lessee, certifying to the accuracy of their statements. Stipulations ¶¶ 3-13; Amended Answer ¶¶ 3, 4, 7, 11, 15, 19, 23, 27.

Complainant has identified portions of pleadings which show the absence of any genuine issues of material fact as to Respondent's liability for the six counts of the Complaint. Respondent has not responded to assert that any such genuine issue of material fact exists. In such a situation, summary judgment is granted "if appropriate," that is, if the movant is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(e).

Respondent sets forth two affirmative defenses, in his Amended Answer (Paragraphs A and B) which Complainant addresses in its Motion.[(3)] In Paragraph A of the Defenses set forth in the Amended Answer, Respondent asserts that he believed that the Property was not subject to the Disclosure Rule under the exception in 40 C.F.R. § 745.101(b), for leases of target housing that have been found to be lead-based paint free by a certified inspector. In that the Property was Section 8 Housing, which is required to be inspected at least annually, including inspection for lead-based paint and lead-based paint hazards, and had been inspected and accepted into the Section 8 Housing Assistance Payment program, Respondent believed that the Property was acceptable and thus pursuant to 40 C.F.R. § 745.101(b) not subject to the Disclosure Rule.

The Prehearing Order required Respondent to submit a copy of any documents in support of the defense in Paragraph A. Respondent's Prehearing Exchange states that Respondent has not provided his counsel with any documents to support Paragraph A.

Section 745.101(b), 40 C.F.R. provides that the Disclosure Rule does not apply to "[l]eases 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." Respondent has the burden of proof on this affirmative defense. 40 C.F.R. § 22.24. Legal conclusions, unsupported by documentation of specific facts, are insufficient to create issues of material fact that would preclude summary judgment. *SEC v. Bonastia,* 614 F.2d 908. 914 (3d Cir. 1980). Respondent's failure to specifically assert or document that the Property was found to be lead-based paint free by such a certified inspector renders the defense inadequate to defeat the Motion.

As to Paragraph B of its Amended Answer, Respondent points out that 40 C.F.R. §§ 745.107 and 745.113 of the Disclosure Rule, as printed in the 1997 and 1998 Code of Federal Regulations, include "Effective Date Notes" which state that those sections "contain[] information collection requirements and will not become effective until approval has been given by the Office of Management and Budget [OMB]."[(4)] Respondent asserts in its Amended Answer that 40 C.F.R. Sections 745.107 and 745.113 are not effective "according to strict interpretation of the 'Effective Date Notes.'" Amended Answer ¶¶ 8, 12, 16, 20, 24, 28. Citing to 44 U.S.C. § 1510(e), Respondent points out that the contents of the Federal Register and Code of Federal Regulations are *prima facie* evidence of the original text and of the fact that the documents printed therein are in effect on and after the date of publication. Respondent concedes that "upon information and belief, OMB has approved such regulations as are at issue here and such approval has been printed in the Federal Register," but argues that "the Code of Federal Regulations does not reflect such approval," and therefore "the regulations are confusing and should not be enforced against the Respondent." Amended Answer p. 11, ¶ B.

In its Prehearing Exchange, Respondent, as directed by the Prehearing Order, elaborates on this defense. Respondent argues that the 1997 and 1998 Code of Federal Regulations states affirmatively that the regulations are not yet in effect because the Office of Management and Budget had not approved such regulations. Under 44 U.S.C. § 1510(a), the Code of Federal Regulations (CFR) "are relied upon by the agency . . . and are in effect as to facts arising on or after dates specified by the Administrative Committee." Respondent argues that, because no modifications to the regulations have been published in the Federal Register since publication of the 1998 issue of the CFR, the *prima facie* evidence is that the regulations are not in effect.

In the July 1, 1996 edition of the CFR, the Effective Date Notes in the Disclosure Rule state that the information collection requirements "will not become effective until approval has been given" by OMB and that "[a] notice will be published in the Federal Register once approval has been obtained." *See,* Respondent's Prehearing Exchange, Exhibit 2. On April 22, 1996, the information collection requests in the Disclosure Rule, including 40 C.F.R. §§ 745.107 and 745.113, were approved by OMB, and assigned OMB Control Number 2070-0151, under the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq*. This approval was published in the Federal Register on May 31, 1996. 61 Fed. Reg. 27348, 27349. *See,* Complainant's Prehearing Exchange, Exhibit 11. Accordingly, as of July 1, 1996, the CFR list of OMB Approvals Under the Paperwork Reduction Act, 40 C.F.R. Part 9, include 40 C.F.R. Part 745 Subpart F. 40 C.F.R. § 9.1 (July 1, 1996, 1997 and 1998). The information collection requirements in the Disclosure Rule thus became effective upon OMB's approval.

However, as Respondent points out, the Effective Date Notes were not deleted from Disclosure Rule in the July 1, 1996 version of the CFR. *See,* Respondent's Prehearing Exchange, Exhibit 2. The Effective Date Notes in the July 1, 1997 and July 1, 1998 versions of the CFR also were not deleted, but the sentence stating that a "notice will be published in the Federal Register once approval has been obtained" was deleted. *See,* Respondent's Prehearing Exchange, Exhibits 3 and 4.

Although the failure of the publishers of the CFR to delete the Effective Date Notes may cause some confusion, such failure does not render the Disclosure Rule requirements unenforceable. The Effective Date Notes in the Disclosure Rule gave advance notification that a notice would be published in the Federal Register once approval has been obtained. The reader is thus directed to look to the Federal Register to determine whether OMB has given its approval. A reader's failure to look for such approval in the Federal Register, or in 40 C.F.R. § 9.1, and its reliance on the mere appearance of the Effective Date Notes in the next editions of the CFR, is not a reasonable reliance and cannot excuse non-compliance with the regulatory requirements.

III. Conclusion

Respondent having no objection to the relief sought in Complainant's Motion to Supplement its Prehearing Exchange, it will be granted.

As to the Motion for Partial Accelerated Decision as to Liability, no genuine issues of fact material to Respondent's liability for the violations alleged in the Complaint have been shown, and Complainant is entitled to judgement as a matter of law as to all six counts in the Complaint.

ORDER

1. Complainant's Motion to Supplement Prehearing Exchange is **GRANTED.**

2. Complainant's Motion for Accelerated Decision is **GRANTED.**

_____ Susan L. Biro
Chief Administrative Law Judge

Dated: November 8, 1999
Washington, D.C.

1. The Disclosure Rule was promulgated pursuant to Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4851 *et seq.*

2. Attached to Complainant's Motion is a Memorandum of Points and Authorities in Support, which will be referred to herein as "Motion."

3. Respondent raises other defenses, in Paragraphs C through I of the Amended Answer, but they pertain to penalty assessment rather than to liability. Complainant addresses another "defense" set forth in the Amended Answer, namely that Respondent denies that he is the sole lessor of the property. Complainant's argument is well taken, that as long as Respondent is *a* lessor of the Property, he is subject to 40 C.F.R. Part 734 Subpart F. The existence of a co-lessor is no defense to liability under the Disclosure Rule.

4. It is noted that the July 1, 1999 Code of Federal Regulations does not include the Effective Date Notes in the Disclosure Rule. As Complainant points out, EPA published a correction in the Federal Register to remove the Effective Date Notes. *See,* 64 Fed. Reg. 39418 (July 22, 1999); Complainant's Prehearing Exchange Exhibit 13..