IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO, ex rel RICHARD CORDRAY, ATTY GENERAL	)	CASE NOS. CV 2007 07 4993 CV 2000 07 3102
Plaintiff	)	JUDGE GIPPIN
-vs-	)	**JUDGMENT**
JOEL HELMS, dba COUNTRYVIEW SOUTH APARTMENTS, et al.	)	(Resolving Civil Penalties)
Defendants	)	(Final and Appealable)

- - -

Civil penalties will be assessed against the Defendants for their Drinking Water violations in the amount of $825,000. All but $82,500 of that amount will be abated, so long as the Defendants remain in compliance with the laws pertaining to safe Drinking Water.

Further civil penalties will be assessed for violation of the Court's Consent Decree in Case No. 2000-07-3102, in the amount of $3,146,000. All but $31,460 of that amount will be abated if the Defendants comply with the Court's injunction to tie into the public sewer system within 30 days of this Judgment.

I. PROCEDURAL STATUS

The Court's Judgment of December 9, 2008, determined that the Defendants were liable for extensive violations of the laws pertaining to Safe Drinking Water and Water Pollution Control (R.C. Chapters 6109 and 6111). Injunctions were issued requiring the

Defendants to tie in to available public drinking water and sewer facilities. Civil penalties were assessed in the amount of $500,000 for Defendants' violation of the Water Pollution laws, potentially subject to abatement if they timely complied with the sewer injunction. They did not comply and the required deadline has now passed. Consequently there has been no abatement of the penalty.

The issues of civil penalties for the Drinking Water violations and enforcement of the Consent Decree were reserved for further evidentiary hearing and determination. Trial of those issues was conducted on April 3 and 9, 2009.

II. FINDINGS OF FACT

A. DRINKING WATER

The Defendants have complied with the injunction in the Court's Order of December 9, 2008, that they tie in to the available public drinking water system. While the connection needs to be made permanent, drinking water is no longer being supplied from the wells. Continuing verification of the connection can be obtained from the company supplying the water. The Drinking Water violations have ceased, but the Court must still consider the evidence to determine the appropriate penalties for the past violations that occurred.

The evidence demonstrated that a large number of the Drinking Water violations previously found by the Court were the result of the Defendants' erroneous belief that they were not subject to particular treatment, monitoring and notification requirements, or even for the most part subject to regulation at all. They had no reasonable basis for that belief.

Of those violations, many derived from the Defendants' conscious decision not to provide primary chlorine treatment of the water, many of the others from the Defendants'

conscious determination that lead and copper and nitrate monitoring either were not required at all under their particular circumstances, or not as often as EPA contended.[1]

Other categories of violation demonstrated at best a cavalier approach to monitoring, public notification and contingency planning. Thus, there were frequent failures of timely testing and public notification. The failures of notification included instances where testing had shown unsafe water. While the Defendants did give notices that the water was unsafe, when that occurred, the notices were not always timely and the Defendants often placed the burden of obtaining bottled water on the tenants, with a rent credit to be provided on proof of purchase. Contingency and monitoring plans were minimal, in one case consisting literally only of a sketch, and were not updated.[2]

A few of the violations only involved *de minimis* testing delays, upon which the Defendants focused in their testimony. But the sum total of these thousands of violations demonstrates a willful disregard for regulatory requirements. This conclusion is reinforced by the rhetoric included in the notices and reports the Defendants issued to their tenants (Defendants' Exhibits OO-1 through 10). The safety of the tenants was at times put at serious risk.

Evidence was received at the April 9, 2009 hearing concerning the Defendants' financial condition and ability to pay penalties. While the Defendants have limited ongoing

---

[1] Those matters account for the violations in Categories 5 (lead and copper monitoring), 12 (notice of failure of lead and copper monitoring), 14 (chlorine residual requirement), 15 (nitrate monitoring and notice), 20 (TTHM and HAA5 monitoring and notice) and 24 (chlorine operating reports). The Category references are to Plaintiff's Exhibit 2.

[2] These violations fall into categories 1-4 and 9-11 (total coliform monitoring and reporting), 6 (contingency plan), 7 (bacteria site sampling plan), 8 (sample monitoring plan), 13 (consumer confidence report copy to EPA), 16 (inorganic monitoring and reporting), 17 (synthetic organic chemical monitoring and reporting), 18 (radionuclide monitoring and reporting), 19 (volatile organic chemical monitoring and reporting), 22 (detail plans) and 23 (monthly operating reports). No violation was claimed in Category 21 (certified operator).

income, they own property (either jointly or separately) with unencumbered equity in excess of $1.3 million, perhaps far more.[3] The evidence also demonstrated that CVS could generate additional net cash flow at fuller occupancy than it has had in the past.

B. CONSENT DECREE

The Consent Decree of April 12, 2002, imposed these pertinent requirements on the Defendants: (1) Compliance with R.C. Chapter 6111 and its implementing rules and regulations and with any NPDES permit or Permit to Install (PTI); (2) Improvements to the operation and maintenance of the Waste Water Treatment Plant (WWTP); (3) Submission of complete and approvable NPDES and PTI applications by May 14, 2002, with immediate resubmission to be made in accordance with EPA comments; (4) Payment of a $25,000 civil penalty within 60 days.

The evidence taken at the trial on August 26-29 and September 2, 2008, as well as the further evidence taken on April 3 and 9, 2009, established that the Defendants violated the Consent Decree. In particular, they did not submit complete and approvable applications, or re-submit them in accordance with EPA's comments. Their failure to do so was in bad faith, as the Court found in the December 9, 2008 Judgment. It is important to repeat here the basis for that conclusion, which was reinforced by the additional evidence the Court received.

OEPA did *not* reject the Defendants' applications simply because they proposed the use of wetlands for tertiary treatment. Rather, OEPA's letter of August 13, 2002 requested additional information to support the proposal. In particular, OEPA asked for an engineering report and alternate treatment plans against the possibility that the proposed wetlands

[3] Only Joel Helms testified. He provided only what he considered to be the minimum values for James Helm's properties and did not know the value of James' personal residence property.

treatment system would fail. The Defendants were proposing an untested system with a minimum of supporting information, submitted by an engineer with very limited wetland treatment knowledge and experience. OEPA's request for additional information was plainly reasonable.

These and other significant pieces of information sought by OEPA simply were not provided. Kenneth Jensen, the Defendants' engineer, confirmed that failure during his testimony on April 9, 2009. The Defendants' notice of appeal filed on April 8, 2004, makes it clear that the Defendants refused to provide the information. They stated no plausible basis for doing so. They cannot reasonably have expected OEPA to approve their applications as submitted. The evidence demonstrates their willful failure to comply with that requirement of the Consent Decree.

The Defendants concede that they intentionally delayed payment of the $25,000 for nearly two years, because of their dissatisfaction with OEPA's treatment of their applications. The Consent Decree contained no conditions on the Defendants' payment of the civil penalty. The failure to obey the payment order further demonstrates the Defendants' willful disregard of all of the obligations imposed upon them, by this Court and otherwise.

By reason of the violations found by the Court in Case No. 2007 07 4993, the Defendants also violated the Consent Decree as to its requirements for compliance with the Water Pollution laws and operation of the WWTP. The Consent Decree included specified penalties for non-compliance of $250 per day for the first 30 days, then $500 for the next 30 days, then $1000 per day thereafter.

III. APPLICABLE LAW

The Court set out the basis for statutory Drinking Water penalties under R.C. Chapter 6109 in the Judgment of December 9, 2008. Each day of noncompliance is a separate violation. Civil penalties for violations are mandatory and may be assessed up to $25,000 per day of violation, pursuant to R.C. 6109.33.

The Court likewise previously set out the criteria for imposing penalties and the applicable precedents. The criteria are these:

> Step 1 - Factors comprising Penalty . . .
>
> [1] the sum appropriate to redress the harm or risk of harm to public health or the environment,
>
> [2] the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance,
>
> [3] the sum appropriate as a penalty for violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and
>
> [4] the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.
>
> Step 2 - Reduction for Mitigating Factors . . .
>
> [1] the sum, if any, to reflect any part of the non-compliance attributable to the government itself,
>
> [2] the sum appropriate to reflect any part of the non-compliance caused by factors completely beyond violator's control (floods, fires, etc.)

State v. Dayton Malleable (2nd Dist.), 1981 Ohio App. LEXIS 12103, *8-9, *rev'd. on other grounds, State v. Dayton Malleable* (1982), 1 Ohio St. 3d 151; *State ex rel. Rogers v. Elbert* (9th App. Dist.), 2008 Ohio 6746, ¶¶ 59-65.

The Court has inherent authority to enforce its own orders, including consent decrees. In doing so, it acts in equity.

IV. ANALYSIS

A. DRINKING WATER PENALTY

The State's evidence supports civil penalties for each of the Defendants' 25,786 days of Drinking Water violations that could total a maximum of $644,925,000.[4] The State has not proposed a particular penalty amount, but instead has supplied the Court with four different suggested analysis methods that yield penalties ranging from $825,000 to over $23 million. The State did not have the Defendants' financial information when it offered its calculations.

As with the Water Pollution violations, all of the "aggravating" *Dayton Malleable* factors suggest a high range of penalty and there are no applicable "mitigating" factors. The Defendants' conduct until very recently has been in willful disregard of the law, resulting in serious risk to the health of their tenants and great expense to the public for enforcement.

The Court's penalty determination must be guided to a substantial degree by the Water Pollution penalty already imposed. While two separate courses of conduct were involved, the violations must nevertheless be viewed in an overall context. The State proposed a penalty of $500,000 for the Water Pollution violations, with which the Court concurred based on the evidence and the weighing of the applicable factors.

Given the more serious consequences to the public of the Drinking Water violations, the proposed minimum penalty of $825,000 is warranted by the evidence and the applicable factors and it is fair in relationship to the Water Pollution penalty. It is also warranted in light of the financial condition evidence. Substantial abatement of the penalty is called for, however, to reflect compliance with the injunction, so long as that compliance continues.

---

[4] The Court uses the lower number of penalty days set out in Plaintiff's Exhibit 2, rather than the 25,797 days proven in the liability phase.

B. CONSENT DECREE

The Court's initial analysis must be whether any of the alleged Consent Decree violations were also violations of the Water Pollution laws for which a penalty has already been imposed. It would be unjust to impose the agreed Consent Degree penalties and also fresh statutory penalties for the same conduct.

Violation of the Consent Decree requirements for compliance with R.C. Chapter 6111 plainly duplicates the conduct previously penalized. Violation of the WWTP operating requirements does so as well.

The Defendants' failure to comply with the NPDES/PTI application requirement was conduct not included in the Water Pollution allegations of the 2007 Complaint, however. While the Court considered the application issue in reaching the December 9, 2008 Judgment, that was only in the context of the Defendants' assertion as a *defense* that their applications should have been approved. The Court rejected that defense, but that was not the same thing as finding that the Water Pollution violations resulted from the non-compliant applications. The issue was specifically reserved in the December 9 Judgment.

The willful failure to submit good faith applications in compliance with the Consent Decree was conduct of a different nature than the Water Pollution violations charged in the later case. The two courses of conduct do not "merge" for purpose of penalty. The Defendants could violate the application requirement without also violating the non-discharge and WWTP operation requirements and vice-versa. The willful failure to make timely payment of the $25,000 civil penalty was likewise not within the scope of the Water Pollution penalty.

There is no question from the evidence that the Defendants violated the cited provisions of the Consent Decree. Those violations generate stipulated penalties under the Consent Decree that calculate to a total of $3,146,000.[5] The Court may in equity give the Defendants relief from their agreement, however. While the Defendants have not complied with the injunction in the December 9, 2008 Judgment, leaving the $500,000 penalty unabated, the Court remains willing in the public interest to offer the Defendants an incentive to comply now.

V. CONCLUSION, INCLUDING JUDGMENTS

A. Plaintiff's demand for judgment for civil penalties and costs for violation of R.C. Chapter 6109 is **GRANTED**, as follows:

1. Defendants are jointly and severally liable for a civil penalty of $825,000.00 for 25,786 days of violations of R.C. Chapter 6109, for which the State of Ohio is granted judgment, to bear interest as provided by law.

2. All but $82,500.00 of the civil penalty shall be abated, and the State of Ohio shall not record a lien for or otherwise attempt to collect the remaining portion of the judgment, so long as the Defendants remain in compliance with the injunction contained in paragraph V.A.1. of the Court's Judgment of December 9, 2008.

3. The State may obtain relief from the abatement and stay of collection by further order of the Court.

---

[5] The Court considers the failure to submit and re-submit the two applications to be one course of conduct, not four, the violations having commenced on May 14, 2002. The calculated penalty is $2,476,000. The $25,000 payment was due on June 11, 2002 and was paid on June 4, 2004, for a calculated penalty of $670,000.

B. Plaintiff's demand for judgment for civil penalties for violation of the Consent Decree entered by the Court on April 12, 2002 in Case No. CV 2000-07-3102 is **GRANTED**, as follows:

1. Defendants are jointly and severally liable for a civil penalty of $3,146,000.00, for which the State of Ohio is granted judgment, to bear interest as provided by law.

2. The civil penalty shall be abated as follows:

A. $3,000,000.00 of the civil penalty shall be abated by further Order of the Court if Defendants comply with the injunction contained in paragraph V.A.2. of the Court's Judgment of December 9, 2008 within 30 days of the entry of this Judgment.

B. A further $52,270.00 of the civil penalty shall be abated by further Order of the Court if Defendants comply with the injunction contained in paragraph V.A.3. of the Court's Judgment of December 9, 2008.

C. A further $52,270.00 of the civil penalty shall be abated by further Order of the Court if Defendants comply with the injunction contained in paragraph V.A.4. of the Court's Judgment of December 9, 2008.

3. Defendants shall pay the costs of this action and are jointly and severally responsible for doing so. Plaintiff's demand for attorney fees and expenses is denied.

The Court will retain jurisdiction to enforce the Judgments it has rendered and to grant relief from the Judgments pursuant to the abatement and stay of collection provisions stated above. This Judgment and the Judgment of December 9, 2008 are final judgments. The Court finds expressly that there is no just reason for delay.

IT IS SO ORDERED.

April 13, 2009

JUDGE ROBERT M. GIPPIN

cc: Messrs. Joel and James Helms
Attorneys L. Scott Helkowski and Jessica Atleson
Attorney John C. Pierson
Attorney William T. Whitaker