

10/13/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
501 Madison Associates; and)	Docket No. CAA-II-94-0110
J.M.J. Cross Enterprises,)	
Inc.,)	
)	
Respondents)	
formerly captioned		
501 Madison Associates; and)	
Temmon & Associates, Inc.,)	
)	
Respondents)	

ORDER GRANTING, DENYING, AND RESERVING JUDGMENT
ON MOTIONS TO AMEND COMPLAINT,
AND DENYING RESPONDENT'S REQUEST FOR DISMISSAL

This case has been initiated by Complainant--the Director, Air and Waste Management Division, Region II, U.S. Environmental Protection Agency--under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d) ("the Act"), for a violation of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, issued pursuant to the Act. The alleged violation was a failure to notify the Agency of a 1993 renovation involving asbestos at a building in New York City.

Motions to Amend Complaint

A major question throughout this case has been the identity of the proper respondents. The original Complaint, filed April 11, 1994, named Respondent 501 Madison Associates ("501 Madison"), as the owner of the building where the renovation took place, and Temmon & Associates Co., Inc. ("Temmon"), as the operator of the asbestos renovation activity. The Complaint proposed a civil penalty of \$25,000.

Complainant moved June 29, 1994 to amend the Complaint. The motion stated that the Answer of Respondent 501 Madison had described a contract with J.M.J. Cross Enterprises, Inc. ("J.M.J. Cross") for the renovation in question, and that this Answer and additional information obtained by Complainant indicated that Temmon was no longer in business. Accordingly, Complainant's motion sought to add J.M.J. Cross as a respondent, and to remove

Temmon. Complainant's motion was not opposed by Respondent 501 Madison, and it was granted July 7, 1994. Complainant filed a Complaint so amended on July 19, 1994.

On August 22, 1994, Respondent J.M.J. Cross filed its Answer denying liability, and also moved for an order requiring Complainant to amend the Complaint to join three additional respondents: Temmon (named in the original Complaint and then deleted), Armtek Corp. ("Armtek"), and Georgio Neofytides. In support of its motion, Respondent J.M.J. Cross alleged that Temmon had performed the renovation activities at issue, and that Armtek and Mr. Neofytides were Temmon's successors in interest.

Complainant opposed Respondent J.M.J. Cross's motion September 1, 1994, arguing that naming respondents falls within its own enforcement discretion as Complainant. In reply, Respondent further supported its request for naming additional respondents with a September 5, 1995 filing. That filing included an affidavit by the president of Respondent J.M.J. Cross, stating his "understanding ... that Temmon ... closed its doors at the end of 1993, and that Georgio Neofytides sold Temmon ... including all of his equipment to Armtek Corp., which is owned by Georgio's son Peter ... [and] Armtek does asbestos abatement work ... [and] Georgio now works as a consultant for Armtek."¹ Also, a woman "who was the Project Secretary at Temmon now does the same work at Armtek."²

Attached to this affidavit was an affirmation of Mr. Neofytides. Mr. Neofytides stated that "[i]n June 1993 I was the authorized licenced representative of Temmon ... to file Notifications for asbestos-abatement jobs with the US EPA ... [and] Temmon is no longer in business."³

One further point concerning parties involves Respondent 501 Madison, at present the only other respondent in the case along with Respondent J.M.J. Cross. Respondent 501 Madison settled this case as to it on November 30, 1994 for a civil penalty of \$1,300.

Ruling

Complainant's motion proposed adding to the Complaint Mr. Neofytides, whereas Respondent's motion proposed adding him and also Temmon and Armtek. As to Mr. Neofytides, the statements in his affirmation and in the affidavit of Respondent J.M.J. Cross's president sufficiently connect Mr. Neofytides to the 1993 building renovation underlying this case to justify naming him as a

¹ Affidavit of Paul K. Hinkley, President of Respondent J.M.J. Cross 4 (September 1, 1995).

² Id. at 2.

³ Affirmation of Georgio Neofytides 1 (August 30, 1995).

respondent. Hence Complainant's motion so to name him will be granted. That decision renders moot the request in Respondent's motion to add Mr. Neofytides to the case.

As to Temmon, Complainant's June 29, 1994 motion to amend the original Complaint and the affidavit and affirmation submitted by Respondent September 5, 1995 all state that Temmon no longer exists. Therefore the request in Respondent's motion to name Temmon as a respondent is denied.

The situation as to Armtek is less clear. The affidavit of Respondent J.M.J. Cross's president indicates that Armtek could be a successor in interest to Temmon. For the moment, decision will be reserved as to Armtek. It may be that the addition of Mr. Neofytides will lead to a resolution of this case, or it may be that it will produce additional evidence clarifying the relevance of Armtek. Complainant has made a strong argument that naming respondents is a matter within its prosecutorial discretion. Nevertheless, it is suggested that Complainant investigate further the possible connection to this case of Armtek.

Complainant's motion to amend the Complaint included one other point: a reduction in the proposed civil penalty from \$25,000 to \$10,000. The reduction, according to Complainant's motion, results from a reevaluation both of the nature of the alleged violation and also of the combined net worth of Respondents. Respondent J.M.J. Cross made no comment on this proposed reduction. The grounds advanced by Complainant for the reduction are reasonable, and Complainant's motion to amend will be granted for this point too.

Request for Dismissal

The affidavit of Respondent J.M.J. Cross's president requested, as an alternative to adding to the case the three proposed respondents, dismissal of the case. The September 5, 1995 letter from Respondent's counsel transmitting the affidavit and its accompanying affirmation asserted that they "show clearly that this proceeding is ripe for Dismissal."

In his affidavit, Respondent J.M.J. Cross's president stated that Respondent had subcontracted the 1993 building renovation at issue to Temmon, and that notifying the Agency was part of Temmon's responsibility as subcontractor. The affidavit recited further that both Mr. Neofytides and also the project secretary of Temmon had told Respondent's president that the notification had been mailed. Mr. Neofytides accompanying affirmation stated that he had dated and mailed the notification to the Agency on June 21, 1993.

In reply, Complainant submitted an affidavit from an Agency official responsible for maintaining records of asbestos notifications of the type at issue here. According to the affidavit, the Agency never received the notification Mr.

Neofytides claimed to have mailed.

Ruling

This case is governed as to procedure by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22. Section 22.20(a) of these Rules provides that a case may be dismissed "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."


Clearly a prima facie case has been established here. Both Respondent J.M.J. Cross's Answer to the Complaint and the affidavit of its president admit that it engaged Temmon to do the renovation work at issue. The affidavit submitted by Complainant asserted that the required notification to the Agency had not been received. Together these items establish Complainant's prima facie case, and no other ground appears for dismissal. Accordingly, Respondent's request will be denied.

Order

Complainant's motion to amend the Complaint by adding as a respondent Georgio Neofytides and by reducing the proposed civil penalty to \$10,000 is granted.

For Respondent's motion to amend the Complaint, the request to add as a respondent Georgio Neofytides has become moot, the request to add as a respondent Temmon is denied, and the request to add as a respondent Armtek is reserved for a later judgment.

Respondent's request to dismiss the case is denied.


Thomas W. Hoya
Administrative Law Judge

Dated:

October 13, 1995

In the Matter of 501 Madison Associates & Temmon & Associates Co.,
Inc., Respondent
Docket No. CAA-II-94-0110

Certificate of Service

I certify that the foregoing Order Granting, Denying, and Reserving Judgment On Motions To Amend Complaint, and Denying Respondent's Request For Dismissal, dated October 13, 1995, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway
New York, NY 10007

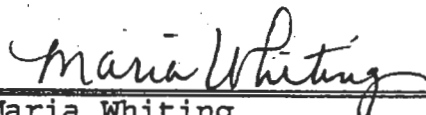
Copy by Regular Mail to:

Attorney for Complainant:

Kate Donnelly, Esquire
Assistant Regional Counsel
U.S. EPA
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Attorney for Respondent:

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Purrington & McConnell
82 Wall Street
New York, NY 10005



Maria Whiting
Legal Staff Assistant

Dated: October 13, 1995