

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Mardaph II, LLC, Mardaph III, LLC) Docket No. TSCA-05-2008-0019
and Vinnie Wilson,)
)
Respondents)

DECISION AND ORDER ON DEFAULT

I. Background

The Complaint initiating this proceeding was filed on July 31, 2008, alleging that Respondents violated the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq.* The Complaint charges Respondent Mardaph II, LLC with 10 counts of violation (Counts 1, 2, 10, 11, 20, 21, 30, 31, 39, and 40) and seeks a penalty of \$30,320 in regard thereto. The Complaint charges Respondent Mardaph III, LLC with 20 counts of violation (Counts 3-6, 12-15, 22-25, 32-35, and 41-44) and seeks a penalty of \$26,840 in regard thereto. The Complaint charges Respondent Vinnie Wilson with 47 counts of violation (counts 1-47) and seeks a penalty of \$91,000 for these violations.

After Respondents, appearing *pro se*, filed responses to the Complaint, by Order dated October 8, 2009, Complainant was directed to file its initial prehearing exchange on November 20, 2009, Respondents were directed to file their prehearing exchange on December 11, 2009, and Complainant was directed to file a rebuttal prehearing exchange on December 28, 2009. Complainant filed its initial Prehearing Exchange in a timely manner. On December 8, 2009, Respondents submitted a Motion for an Extension of Time, seeking a sixty (60) day extension of time to file their prehearing exchange. By Order dated December 10, 2009, the lengthy extension was granted. On February 9, 2010, Respondents sought another sixty day extension of time, but by Order dated February 16, 2010, Respondents were granted only an additional 30 days, until March 16, 2010, to file their prehearing exchange.

Respondents did not file their prehearing exchanges by that date, and consequently on March 25, 2010, an Order to Show Cause was issued, ordering Respondents to show cause on or before April 2, 2010 why they failed to submit their prehearing exchanges in a timely manner and why a default order should not be entered against them. The Order stated: “**Failure to timely respond to this Order in a timely manner will result in the entry of default without further notice.**” (emphasis in original). To date, Respondents have not responded to the Order to Show Cause and have not filed their prehearing exchanges.

II. Applicable Procedural Rules and Standards

The Rules of Practice provide at 40 C.F.R. § 22.17(a) and(c) as follows:

A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer. . . . Default by respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

* * * *

When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act..

A default judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays. *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001)(quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F.3d 852, 856 (8th Cir. 1996). Default judgment “is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays.” *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. *See, Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant.” *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

The Environmental Appeals Board (EAB) has stated that “where a respondent fails to adhere to a procedural requirement, [the EAB] has traditionally applied a ‘totality of circumstances’ test to determine whether a default order should be . . . entered” *JHNY, Inc.* CAA Appeal No. 04-09 (Final Order, September 30, 2005), slip op. at 16-17. The EAB considers several factors under this test: the alleged procedural omission, considering whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement. *Id.*, slip op. at 17. The EAB states that it is not necessary to find repeated failures to timely submit prehearing exchange information in order to issue a default order. *Id.*, slip op. at 24. The EAB upheld a default order upon respondent’s

tardiness in filing, and failure to attach proposed exhibits to, the initial prehearing exchange statement, where respondent alleged that the documents were provided to complainant in settlement discussions. *Id.*

III. Discussion

To date, Respondents have failed to file their prehearing exchanges despite having been granted very generous extensions of time to do so. In addition, they have failed to comply with the Order to Show Cause. They have willfully violated the Prehearing Order and Order to Show Cause, and thus have intentionally delayed this proceeding. A Status Report filed by Complainant on March 29, 2010 states that Complainant has been unable to contact Respondents by telephone and has received no response to letters sent. A Status Report filed on April 2, 2010 states that Complainant has not received a prehearing exchange, but did receive on April 2, 2010 a packet of documents from Respondent Vinnie Wilson regarding the Respondents' ability to pay, a copy of which were not sent to the undersigned. The case file does not show good cause why a default order should not be issued. Therefore, Respondents are held in default, and under the Rules are deemed to have admitted all of the facts alleged in the Complaint and to have waived their right to contest them..

However, given the broad discretion that presiding judges have in ruling on default, including the discretion to grant a default order "as to any or all parts of the proceeding," a default order only as to Respondents' liability is appropriate under the circumstances of this case. Complainant has not requested a default order assessing the proposed penalties. Respondents submitted to the undersigned on October 21, 2009 by facsimile copies of some financial documents, including tax returns, which appear to address their ability to pay a penalty. In addition, Respondent Vinnie Wilson submitted to Complainant a packet of documents regarding ability to pay, which Complainant stated it will review to determine ability to pay. It cannot be determined at this point whether the proposed penalties are consistent with the record of the proceeding or with the Act. Accordingly, the issue of the penalty is reserved for further proceedings.

Accordingly, based upon the Complaint and the documents of record, I make the following Findings of Fact and Conclusions of Law:

IV. Findings of Fact and Conclusions of Law

1. Between February 1, 2006 and January 1, 2007, Respondent Mardaph II, LLC owned residential rental properties in Cincinnati, Ohio which were constructed prior to 1978 and were "target housing" under 40 C.F.R. § 735.103, namely those situated at 711 Marion Road and 8750 Venus Drive, Cincinnati, Ohio.

2. Between January 27, 2006 and December 1, 2006, Respondent Mardaph III, LLC owned residential rental properties in Cincinnati, Ohio which were constructed prior to 1978 and were “target housing” under 40 C.F.R. § 735.103, namely those situated at 2605, 2637 and 2639 Fenton Avenue and 3341 McHenry Avenue, Cincinnati, Ohio.
3. Between August 1, 2005 and November 3, 2006, Respondent Vinnie Wilson owned residential rental properties in Cincinnati, Ohio which were constructed prior to 1978 and were “target housing” under 40 C.F.R. § 735.103, namely those situated at 1815 Clarion Avenue, 2636 Fenton Avenue, 4537 Lucerne Avenue and 1530 Kinney Avenue, Cincinnati, Ohio.
4. Between August 1, 2005 and January 1, 2007, Respondent Vinnie Wilson managed the rental properties referenced in Paragraphs 1, 2 and 3 and was the agent of the other two Respondents during this period.
5. Respondent Mardaph II, LLC either directly or through its agent Ms. Wilson, entered into two written rental agreements to lease the properties referenced in Paragraph 1. Respondent Mardaph III, LLC either directly or through its agent Ms. Wilson, entered into four written rental agreements to lease the properties referenced in Paragraph 2. Respondent Vinnie Wilson entered into four written rental agreements to lease the properties referenced in Paragraph 3. Each of the ten contracts covered a term of occupancy of greater than 100 days..
6. Respondent Mardaph II, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a Lead Warning Statement before the lessee was obligated under the contract, with regard to the properties referenced in Paragraph 1.
7. Respondent Mardaph III, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a Lead Warning Statement before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 2.
8. Respondent Vinnie Wilson, as lessor, failed to include, either within the contract or as an attachment thereto a Lead Warning Statement before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 3.
9. Respondent Vinnie Wilson, as agent, failed to include or ensure that the lessor include, either within the contract or as an attachment thereto a Lead Warning Statement, before the lessee was obligated under the contract, with regard to properties referenced in Paragraphs 1 and 2.
10. Respondent Mardaph II, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a statement disclosing either the presence of any known lead based paint and or lead based paint hazards in the target housing, or a lack of knowledge of such presence, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 1.
11. Respondent Mardaph III, LLC, as lessor, failed to include, either within the contract or as an

attachment thereto a statement disclosing either the presence of any known lead based paint and or lead based paint hazards in the target housing, or a lack of knowledge of such presence, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 2.

12. Respondent Vinnie Wilson, as lessor, failed to include, either within the contract or as an attachment thereto a statement disclosing either the presence of any known lead based paint and or lead based paint hazards in the target housing, or a lack of knowledge of such presence, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 3.

13. Respondent Vinnie Wilson, as agent, failed to include or ensure that the lessor include, either within the contract or as an attachment thereto a statement disclosing either the presence of any known lead based paint and or lead based paint hazards in the target housing, or a lack of knowledge of such presence before the lessee was obligated under the contract, with regard to properties referenced in Paragraphs 1 and 2.

14. Respondent Mardaph II, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a list of any records or reports available to the lessor regarding lead based paint or lead based paint hazards, or a statement that no such records are available, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 1.

15. Respondent Mardaph III, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a list of any records or reports available to the lessor regarding lead based paint or lead based paint hazards, or a statement that no such records are available, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 2.

16. Respondent Vinnie Wilson, as lessor, failed to include, either within the contract or as an attachment thereto a list of any records or reports available to the lessor regarding lead based paint or lead based paint hazards, or a statement that no such records are available, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 3.

17. Respondent Vinnie Wilson, as agent, failed to include or ensure that the lessor include, either within the contract or as an attachment thereto a list of any records or reports available to the lessor regarding lead based paint or lead based paint hazards, or a statement that no such records are available, or a lack of knowledge of such presence, before the lessee was obligated under the contract, with regard to properties referenced in Paragraphs 1 and 2.

18. Respondent Mardaph II, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (b)(3), and a lead hazard information pamphlet, before the lessee was obligated under the contract, with regard to the properties referenced in Paragraph 1.

19. Respondent Mardaph III, LLC, as lessor, failed to include, either within the contract or as an attachment thereto a statement by the lessee affirming receipt of the information set out in 40

C.F.R. §§ 745.113(b)(2) and (b)(3), and a lead hazard information pamphlet, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 2.

20. Respondent Vinnie Wilson, as lessor, failed to include, either within the contract or as an attachment thereto a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (b)(3), and a lead hazard information pamphlet, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 3.

21. Respondent Vinnie Wilson, as agent, failed to include or ensure that the lessor include, either within the contract or as an attachment thereto a statement by the lessee affirming receipt of the information set out in 40 C.F.R. §§ 745.113(b)(2) and (b)(3), and a lead hazard information pamphlet, before the lessee was obligated under the contract, with regard to properties referenced in Paragraphs 1 and 2.

22. Respondent Mardaph II, LLC, as lessor, failed to include, either within the contract or as an attachment thereto the signatures of the lessor, agent and the lessee certifying to the accuracy of their statements and dates of signature, before the lessee was obligated under the contract, with regard to the properties referenced in Paragraph 1.

23. Respondent Mardaph III, LLC, as lessor, failed to include, either within the contract or as an attachment thereto the signatures of the lessor, agent and the lessee certifying to the accuracy of their statements and dates of signature, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 2.

24. Respondent Vinnie Wilson, as lessor, failed to include, either within the contract or as an attachment thereto the signatures of the lessor, agent and the lessee certifying to the accuracy of their statements and dates of signature, before the lessee was obligated under the contract, with regard to properties referenced in Paragraph 3.

25. Respondent Vinnie Wilson, as agent, failed to include or ensure that the lessor include, either within the contract or as an attachment thereto the signatures of the lessor, agent and the lessee certifying to the accuracy of their statements and dates of signature, before the lessee was obligated under the contract, with regard to properties referenced in Paragraphs 1 and 2.

26. Vinnie Wilson violated 40 C.F.R. §§ 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) as alleged in Counts 1 through 47 of the Complaint.

27. Mardaph II, LLC violated 40 C.F.R. §§ 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) as alleged in Counts 1, 2, 10, 11, 20, 21, 30, 31, 39, and 40 of the Complaint.

28. Mardaph III, LLC violated 40 C.F.R. §§ 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) as alleged in Counts 3 through 6, 12 through 15, 22 through 25, 32 through 35, and 41 through 44 of the Complaint.

ORDER

1. Respondents Mardaph II, LLC, Mardaph III, LLC and Vinnie Wilson, are hereby found **in DEFAULT**, are deemed to have admitted all facts alleged in the Complaint, and are liable for violations of 40 C.F.R. §§ 745.113(b)(1), (b)(2), (b)(3), (b)(4) and (b)(6) as alleged in the Complaint. Specifically, Respondent Mardaph II, LLC is liable for the violations alleged in Counts 1, 2, 10, 11, 20, 21, 30, 31, 39, and 40 of the Complaint; Respondent Mardaph III, LLC is liable for the violations alleged in Counts 3 through 6, 12 through 15, 22 through 25, 32 through 35, and 41 through 44 of the Complaint; and Respondent Vinnie Wilson is liable for the violations alleged in Counts 1 through 47 of the Complaint.
2. The issue of any penalties to assess for these violations is reserved for further proceedings. Complainant shall file and serve, on or before **April 30, 2010**, a narrative statement explaining in detail any revision to the penalties proposed in the Complaint based upon relevant information it has gathered to date, along with a copy of any documents in support that have not been submitted in its Prehearing Exchange.
3. Respondents shall submit, on or before **May 14, 2010**, a narrative response to Complainant's statement as to penalties, along with any and all documents Respondents consider relevant to the assessment of any penalties for the violations.
4. Complainant shall file any reply to Respondents' response on or before **May 21, 2010**.

Susan L. Biro
Chief Administrative Law Judge

Date: April 15, 2010
Washington, D.C.