

ROHIT SHAH,	:	<u>SUPERIOR COURT OF NEW</u>
	:	<u>JERSEY CHANCERY DIVISION</u>
Plaintiff,	:	<u>HUDSON COUNTY</u>
v.	:	DOCKET NO. C-52-12
NEW JERSEY DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION,	:	
Defendant.	:	<u>CIVIL ACTION</u>
NEW JERSEY DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION; and THE	:	
ADMINISTRATOR OF THE NEW JERSEY SPILL	:	
COMPENSATION FUND,	:	
Third-Party Plaintiffs,	:	
v.	:	
ROHIT SHAH, in his individual	:	
capacity; 304 CENTRAL ENTERPRISES,	:	
LLC, and 304 CENTRAL ENTERPRISES II,	:	
LLC,	:	
Third-Party Defendants.	:	

BRIEF IN SUPPORT OF DEFENDANT AND THIRD-PARTY PLAINTIFFS' SECOND MOTION IN AID OF LITIGANTS' RIGHTS AGAINST ROHIT SHAH, 304 CENTRAL ENTERPRISES, LLC, AND 304 CENTRAL ENTERPRISES II, LLC

On the Brief
Paige A. Hensor (238722019)
Deputy Attorney General

MATTHEW J. PLATKIN
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market St.
P.O. Box 093
Trenton, NJ 08625
609-376-2789
Attorney for Defendant, New Jersey
Department of Environmental
Protection and Third-Party
Plaintiffs, New Jersey Department
of Environmental Protection and
the Administrator of the New Jersey
Spill Compensation Fund
paige.hensor@law.njoag.gov

PRELIMINARY STATEMENT

Rohit Shah, 304 Central Enterprises, LLC, and 304 Central Enterprises II, LLC (collectively, "Shah Defendants") have violated two separate Superior Court orders: an August 13, 2013 Consent Judgment ("2013 Consent Judgment"), and a June 21, 2019 order granting the Department of Environmental Protection's ("DEP") and the Administrator of the New Jersey Spill Compensation Fund's (collectively, "Department") first Motion in Aid of Litigants' Rights ("2019 Order"). The Shah Defendants' continued noncompliance with these orders has left a public health and safety hazard unabated at a Jersey City property owned by Shah ("Site"), subjecting the public and the environment to an ongoing risk of harm.

Per the 2013 Consent Judgment with DEP, the Shah Defendants agreed to conduct full remediation of the Site, pay civil penalties, and reimburse the Department for its costs administering and cleaning the Site. After the Shah Defendants failed to perform any remediation for nearly six years, the Department filed its first Motion in Aid of Litigants' Rights pursuant to R. 1:10-3, seeking an order compelling the Shah Defendants to comply with the 2013 Consent Judgment. The Court granted the Department's motion and issued the 2019 Order. Specifically, the 2019 Order required the Shah Defendants to conduct all remediation required at the Site. The Shah Defendants

have failed to conduct the required remediation in violation of the 2013 Consent Judgment and 2019 Order by continually.

Accordingly, the Department files this second Motion in Aid of Litigants' Rights seeking an order compelling the Shah Defendants to abide by the terms of the 2013 Consent Judgment and the 2019 Order and imposing sanctions on the Shah Defendants pursuant to R. 1:10-3 to compel compliance. The Department also seeks an award of civil penalties against the Shah Defendants for their violations of the 2013 Consent Judgment and the 2019 Order pursuant to the Spill Act.

STATEMENT OF FACTS

Rohit Shah initiated this action on March 23, 2012, by filing a Verified Complaint against DEP alleging that its filing of liens against his property pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 ("Spill Act"), violated his state and federal constitutional rights ("Shah Complaint"). Certification of Paige A. Hensor in Support of Defendant and Third-Party Plaintiffs' Second Motion in Aid of Litigant's Rights ("Hensor Cert."), ¶4. The liens were filed in connection with cleanup and removal costs incurred by the Department in an emergency response action performed by DEP at the Site. Specifically, on November 14, 2006, the Jersey City Fire Department notified the Department of a spill of tetrachloroethylene ("PCE") at the Site. Najjar Cert. at ¶7, Exhibit 1.

DEP filed an Answer and Counterclaim in response to the Shah Complaint, denying that the liens were unlawfully filed and asserting various defenses to the allegations in the Shah Complaint. The Department also filed a Third-Party Complaint against Shah and the Third-Party Defendants, 304 Central Enterprises, LLC, and 304 Central Enterprises II, LLC. The Counterclaim and Third-Party Complaint sought reimbursement under the Spill Act of the costs it incurred remediating the Site, as well as injunctive and other relief. Hensor Cert. at ¶ 4.

On August 13, 2013, the parties entered into, and the Court executed, a Consent Judgment that required the Shah Defendants to conduct all remediation at the Site and pay DEP \$40,000 in reimbursement of the Department's past cleanup and removal costs for the Site. Hensor Cert. at ¶5, Exhibit A, at ¶25-26. The Site consists of real property located at 304 Central Avenue, Jersey City, Hudson County, New Jersey, which is also known as Block 3801, Lot 11 (formerly block 753 lot 2B.99) on the Tax Map of Jersey City, and all other areas where any hazardous substance discharged there has come to be located. Id., ¶4.

Notwithstanding the clear requirements of the 2013 Consent Judgment, the Shah Defendants failed to remediate the Site. Specifically, the Shah Defendants were ordered to retain a Licensed Site Remediation Professional ("LSRP") to perform a remedial investigation, file a remedial action report, and submit a response

action outcome ("RAO"). Certification of Erica Najjar in Support of the Motion In Aid of Litigants' Rights ("Najar Cert."), ¶9. Despite DEP sending a Notice of Violation dated September 21, 2017, and final notice letters for annual remediation fees every year between 2015 and 2023, the Shah Defendants, to date, have failed to remediate the Site. Id., ¶10.

Prior to filing its first motion, this office sent a letter informing the Shah Defendants of their continued non-compliance with the consent judgment, and further requesting compliance. Hensor Cert. at ¶7, Exhibit B. The Department filed its first Motion in Aid of Litigant's Rights on May 9, 2019, requesting that the Court direct the Shah Defendants to comply with the 2013 Consent Judgment. On June 21, 2019, this Court granted the Department's motion and issued the 2019 Order, which ordered the Shah Defendants to conduct all remediation at the Site and comply with the 2013 Consent Judgment. Hensor Cert. at ¶10, Exhibit E ¶2.

This Court, however, declined to impose sanctions because it found that the Shah Defendants had made efforts to begin the remediation. Specifically, this Court referred to a letter dated May 28, 2019, provided by the Shah Defendants to DEP acknowledging receipt of an LSRP Notification of Retention Form noting that Frank G. Brockerhoff of Brockerhoff Environmental Services, LLC had been

retained to perform the required remediation.¹ Hensor Cert. at ¶10, Exhibit E, ¶11. While minimal, the LSRP conducted sampling at the site, but determined more remediation was necessary. Brockerhoff Cert., at ¶4. Because an LSRP had been retained, this Court determined that adequate efforts had been taken to begin remediation, and that the Shah Defendants should continue to remediate. Hensor Cert. at 10, Exhibit E, ¶2-3. The Court also stated that the Shah Defendants had "three months to perform appreciable work towards remediation of the site, or else DEP could refile its application and seek sanctions." Id., Exhibit E, ¶12. Once retained, the LSRP conducted minimal sampling and found contamination, therefore, requiring further investigation and/or remediation. Brockerhoff Cert., at ¶4. Brockerhoff did not receive authorization from the Shah Defendants to conduct remediation, or payment for services already rendered, so Brockerhoff dismissed himself and his firm as LSRP. Brockerhoff Cert., ¶6. Despite the Court ordering compliance, the Shah Defendants, to date, have failed to remediate the Site. Hensor Cert., at ¶11.

ARGUMENT

THE SHAH DEFENDANTS' CLEAR VIOLATION OF THE 2013 CONSENT JUDGMENT AND 2019 ORDER WARRANT THE IMPOSITION OF SANCTIONS UNDER R. 1:10-3 AND CIVIL PENALTIES UNDER THE SPILL ACT

¹This letter is dated after the Department filed its first motion in aid of litigant's rights.

The Department files this second Motion in Aid of Litigant's Rights due to the Shah Defendants' years' long failure to comply with its obligation to remediate the Site set forth first in the 2013 Consent Judgment and again in the 2019 Order. As a result of the Shah Defendants' egregious disregard for these prior orders, the Department seeks an order under R. 1:10-3 requiring the Shah Defendants conduct all remediation required by the 2013 Consent Judgment and 2019 Court Order, and also imposing sanctions. Only through the imposition of sanctions can the court ensure that the Shah Defendants finally comply. Moreover, the Department also seeks an award of penalties against the Shah Defendants under the Spill Act for their failure to comply with the 2013 Consent Judgment and 2019 Court Order.

A. The Shah Defendants Violated the Express Terms of the 2013 Consent Judgment and the 2019 Order and the Department Is Entitled to an Order Enforcing Their Terms

The Department seeks relief under R. 1:10-3. Rule 1:10-3 authorizes a litigant in any action to seek relief, by application in the action, for a finding of a violation of litigant's rights by parties who fail to comply with court orders. To receive relief under R. 1:10-3, the Court must find: (1) that the party against whom relief is sought has been the subject of an order of the Court; (2) that the party has failed and refused to comply with that order; (3) that the party has done so although fully capable

of complying with the order in question. In re N.J.A.C. 5:96, 221 N.J. 1, 19 (2015). Violations of judgments are appropriate for R. 1:10-3 motions. Id. at 17.

There is no dispute that the Shah Defendants were the subjects of the 2013 Consent Judgment, which is an order of the Court, and the 2019 Order. As detailed below, the 2013 Consent Judgment imposed on the Shah Defendants the obligation to remediate and the 2019 Order reiterated those obligations.

Nor is there any dispute that the Shah Defendants failed to comply with the 2013 Consent Judgment and 2019 Order. The 2013 Consent Judgment ordered the Shah Defendants to "conduct all remediation at the Site." Hensor Cert. at ¶5, Exhibit A. The Shah Defendants failed to comply. Najar Cert., ¶9. On or about September 21, 2017, DEP issued a Notice of Violation to Rohit Shah and 304 Central Enterprises II, LLC, detailing their failure to remediate the Site and non-compliance with the 2013 Consent Judgment. Najar Cert., at ¶10. The 2013 Consent Judgment required the Shah Defendants "to conduct all remediation required at the site in accordance with the Administrative Requirements for Remediation of Contaminated Sites, N.J.A.C. 7:26C." Hensor Cert. at ¶5, Exhibit A at ¶29. In practice this required the Shah Defendants to submit a remedial investigation report ("RIR") to the DEP by May 7, 2017, retain an LSRP by November 2, 2020, and submit a remedial action report ("RAR")/ obtain an RAO for all

areas of concern by May 6, 2022. Najjar Cert., at ¶13, N.J.A.C. 7:26C-3.3. None of those deadlines have been met.

After six years of the Shah Defendants' failing to remediate the Site as required by the 2013 Consent Judgment, the Department filed its first Motion to Enforce Litigants' Rights in 2019. This Court granted the motion in large part, once again ordering the Shah Defendants to conduct all remediation at the Site. Hensor Cert. at ¶10, Exhibit E. In the 2019 Order, this Court found that the Shah Defendants refused to comply with the terms of the 2013 Consent Judgment, despite having been fully capable of conducting the remediation at the Site. Id.

Now, an additional four years after the Court first ordered the Shah Defendants to remediate the Site, they have still not complied with their obligations under the 2019 Order and the 2013 Consent Judgment. To the contrary, they have gone backward. To avoid the imposition of sanctions in connection with the first Motion to Enforce Litigants' Rights, the Shah Defendants assured the Department and this Court that they intended to perform additional remediation at the Site, as required by the Consent Judgment. Hensor Cert. at ¶10, Exhibit A at 10-11. As evidence of their purported intent, the Shah Defendants relied on the retention of Frank G. Bockerhoff of Bockerhoff Environmental Services, LLC, to perform the required remediation. Statement of Reasons 2019 Order, at ¶7. But Bockerhoff has since dismissed

himself as LSRP for the Site due to the Shah Defendants' unwillingness to continue remediation and failure to pay for his services. Certification of Frank Brockerhoff, ¶6 ("Brockerhoff Cert.").

To date, apart from briefly hiring an LSRP that has now withdrawn, the Shah Defendants have not taken any affirmative steps to remediate the Site, let alone complied with their obligation to conduct all remediation at the Site as required by the 2013 Consent Judgment and 2019 Order. Najar Cert., ¶12. Specifically, the LSRP conducted sampling and determined that further investigation and/or remediation was necessary. Brockerhoff Cert., at ¶4. The LSRP sent an authorization letter to the Shah Defendants requesting authorization to conduct further investigation and remediation, as well as for them to remit payment for services rendered. Brockerhoff Cert., at ¶5. The Shah Defendants failed to authorize further investigation and/or remediation, and failed to remit payment, thus causing Brockerhoff and his firm to dismiss themselves as LSRP. Brockerhoff Cert., at ¶6. The Shah Defendants have not provided an explanation for their continued noncompliance. Najar Cert., ¶14. Each day the Shah Defendants fail to perform the remediation at the Site, a public health and safety hazard will remain unabated, subjecting the public and the environment to an ongoing risk of harm.

The Shah Defendants' flagrant disregard for this Court's orders, the public health, and the environment health has exacerbated the need for swift injunctive relief requiring compliance. Accordingly, this Court should issue an order requiring the Shah Defendants to remediate the Site immediately.

B. The Shah Defendants' Repeated Failure to Comply with the 2013 Consent Judgement and the 2019 Order Warrant the Imposition of Strict Sanctions to Compel Compliance.

The power to impose sanctions is inherent in the authority of the court. Trisun Corp. v. West New York, 341 N.J. Super. 556, 559 (App. Div. 2001). Rule 1:10-3 provides that litigants may apply to the court for sanctions against any party who has willfully disregarded a court order with no good reason to do so. However, when the relief sought is the enforcement of an order, there is no "willfulness" requirement. Pressler & Verniero, Current N.J. Court Rules, cmt. 4.3 on R. 1:10-3 (2019); see In re Adoption of N.J.A.C. 5:96, 221 N.J. 1, 17-19 (2015) (enforcement of litigants' rights under rule did not require willful noncompliance with order). "A monetary sanction imposed pursuant to [R. 1:10-3] and unrelated to a litigant's damages is an entirely proper tool to compel compliance with a court order." Franklin Twp. Bd. Of Educ. v. Quakertown Educ. Ass'n., 274 N.J. Super 47, 55-56 (App. Div. 1994) (interpreting former R. 1:10-5, which was redesigned as

current R. 1:10-3). Sanctions under R. 1:10-3 are intended to be coercive, not punitive. Id. at 56.

Even after signing the 2013 Consent Judgment, receiving a Notice of Violation from DEP, receiving correspondence from this office directing compliance, and the issuance of a second Order from this Court compelling compliance, the Shah Defendants have not complied. The Shah Defendants have violated the 2013 Consent Judgment and 2019 Order by not conducting any appreciable work towards remediation. While the Shah Defendants previously claimed to hire an LSRP, minimal sampling was conducted and it was determined that further investigation/remediation was necessary. Bockerhoff Cert., ¶4. No further remediation was authorized and the LSRP dismissed himself immediately after the 2019 Order because of the Shah Defendants' unwillingness to move forward with the investigation needed for remediation and lack of payment. Bockerhoff Cert., ¶6.

While demonstrating willfulness is not necessary, it is clear that the Shah Defendants' behavior has been willfully contumacious. They have ignored two orders of this Court and have given no reason as to why they are unable to comply. The Shah Defendants have been given ample time to comply with the 2013 Consent Judgment and 2019 Order by performing remediation and, therefore, the Department proposes that an appropriate sanction should be imposed to "sting and force compliance" with the 2013

Consent Judgment and 2019 Order. Franklin Twp. Bd. Of Educ., 274 N.J. Super. at 56. This proposed sanction is designed to be coercive, compelling the Shah Defendants to complete the remediation at the Site.

C. The Court Should Impose Civil Penalties on the Shah Defendants for Their Failure to Comply with the 2013 Consent Judgment and the 2019 Order.

Where a party has failed to comply with an order pursuant to the Spill Act, they are subject to civil penalties. The Shah Defendants have failed to comply with their remedial obligations under the 2013 Consent Judgment and 2019 Order, and therefore, should be ordered to pay civil penalties.

Any person who violates the Spill Act or any order issued pursuant thereto, "shall be subject to a civil penalty not to exceed \$50,000 per day for each violation, and each day's continuance of the violation shall constitute a separate violation." N.J.S.A. § 58:10-23.11u(d). The 2013 Consent Judgment is an order pursuant to the Spill Act. Each day the Shah Defendants fail to comply with their obligations in the 2013 Consent Judgment they are subject to a civil penalty. These penalties are critical to encourage compliance within the regulated community and to deter others from ignoring their remedial obligations.


The Shah Defendants have ignored the 2013 Consent Judgment and the 2019 Order for ten years now. The Department requests

that this Court impose a civil penalty of \$500,000, which represents the amount of civil penalties that the Shah Defendants would face for one day of each year they have ignored the 2013 Consent Judgment and the 2019 Order in violation of N.J.S.A. 58:10-23.11u(d). N.J.A.C. 7:26C-1.2(a) states that a person responsible for conducting the remediation shall conduct the remediation in accordance with all applicable statutes, rules, guidance, and standards. The Shah Defendants have ignored the 2013 Consent Judgment and the 2019 Order willfully, and should be penalized accordingly.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court enter an order enforcing the terms of the 2013 Consent Judgment and 2019 Order requiring the Shah Defendants to remediate the Site, imposing monetary sanctions, and imposing penalties for the Shah Defendants' repeated failures to comply with two orders issued by this Court.

Date: 9/28/2023



Paige A. Hensor
Deputy Attorney General