UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
TONY J. PAPADIMITRIOU,	)	**DOCKET NO. TSCA-03-2008-0035**
	)	
	)	
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

On December 31, 2007, the United States Environmental Protection Agency, Region III, ("Complainant" or the "EPA"), filed a twenty-six (26) count Complaint against Tony J. Papadimitriou ("Respondent") pursuant to Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). Complainant alleges that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("RLBPHRA"), for failure to comply with the regulatory requirements of the implementing regulations at 40 C.F.R. part 745, subpart F, "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"). Specifically, the Complaint alleges that Respondent failed to make disclosures concerning lead-based paint to prospective lessees of Target Housing and/or to include certification and acknowledgment of disclosures as required by the Disclosure Rule, in twenty-six instances in connection with fourteen written leases of thirteen residential units. Complainant seeks a civil administrative penalty in the amount of $102,950 against Respondent.

On February 10, 2009, Complaint submitted a Motion for Accelerated Decision as to Liability ("Motion") on all twenty-six counts.[1/] Respondent submitted its Response to Complainant's Motion for Accelerated Decision as to Liability ("Response") on February 24, 2009. Respondent contends that there are genuine issues of material fact in dispute and that Complainant is not entitled to relief as requested in its Motion.

[1/] By filing so close to the scheduled hearing, Complainant has not provided ample opportunity to prepare an in-depth order on this issue.

Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. § 22.20 (a), authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.,* 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Belmont Plating Works,* Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, Sept. 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision before this Tribunal. *See CWM Chemical Service,* 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-159; *see also Cone v. Longmont United Hospital Assoc.,* 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson,* 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson,* 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly support motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett,* 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.,* Docket No. TSCA-V-C-052-02, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, than no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a general factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to

judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536, (8th Cir. 1979).

Discussion

Complainant asserts that no genuine issue of material fact exists as to the liability of the Respondent as charged in the Complaint and that Complainant is entitled to judgment as a matter of law under all twenty-six counts of the Complaint. Complainant cites Respondent's admissions in the Answer and documents filed in the Prehearing Exchange to support its Motion for Accelerated Decision as to Liability. Motion at 52. In response, Respondent argues that accelerated decision is not appropriate in this case because he has alleged numerous defenses and mitigating circumstances that serve as denials of the allegations and that there are mitigating factors to consider in assessing any civil penalty. Response at 1 (not numbered in original).

More particularly, Complainant contends that Respondent admitted in the Answer that the residential dwellings at issue were constructed prior to 1978, and that they were not "0-bedroom" dwellings or housing for the elderly or disabled persons. Motion at 28. Complainant argues that there is no dispute that the properties are "target housing" as defined by Section 1004(27) of the RLBPHRA, Section 401(7) of TSCA, and 40 C.F.R. § 745.103, and therefore are subject to the Disclosure Rule. Motion at 29. Complainant also contends that at all times relevant to the Complaint, Respondent was the "owner" and "lessor" of the target housing. Motion at 30.

Complainant argues that Respondent failed to comply with the Disclosure Rule regarding the leasing of the target housing. In connection with the various lease transactions specified in the Complaint, the EPA maintains that Respondent admitted in the Answer the following violations of the Disclosure Rule: He did not provide the lessee with an EPA-approved lead hazard information pamphlet prior to the lessee being obligated under the contract to lease the target housing; he did not disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being leased; he did not provide the lessee with any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being leased; he failed to include a Lead Warning Statement either as an attachment to, or within, the leases for the target housing; he failed to include, as an attachment or within the lease, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of known lead-based

paint and/or lead-based paint hazards; he failed to include, as an attachment or within the lease, a statement disclosing any additional information available concerning the known lead-based paint and/or lead-based paint hazards; he failed to include, as an attachment or within the lease, a statement by the lessee affirming receipt of the lead hazard information pamphlet and the lessor's statements concerning the disclosure of the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of known lead-based paint and/or lead-based paint hazards, or a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards or indicating no records or reports are available; and he failed to include, as an attachment, or within the lease, the signatures of the lessor and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

In its Response, Respondent does not dispute that the RLBPHRA and the Disclosure Rule apply to the lease transactions identified in the Complaint. Response at 8. In this regard, Respondent acknowledges that the units identified in the Complaint are "target housing" and that Respondent was the "owner" or "lessor" of target housing. Id. at 8-9. Further, Respondent admits these facts in the Answer and the parties have stipulated to these facts in the Joint Stipulations dated February 25, 2009. Answer at ¶¶ 18-22; Joint Stipulations at ¶ 1. As such, the parties need not present evidence concerning these facts at the hearing.

In his Response, however, Respondent does oppose Complainant's Motion on the ground that genuine disputes of material fact remain. First, Respondent asserts that of the fourteen referenced lease transactions, five were executed prior to October 26, 2005, when he met with Mr. Boyer of the EPA and was informed of his obligations under the RLBPHRA and the Disclosure Rule, and that Respondent was unaware of his obligations under the RLBPHRA and the Disclosure Rule before that date.

Although Respondent does not clearly argue that his lack of knowledge and information concerning his obligations under the RLBPHRA and the Disclosure Rule constitutes a defense that defeats liability, as opposed to an argument for mitigating the penalty, I must assume that Respondent is asserting such defense. I point out that TSCA is a strict liability statute. *Leonard Strandley*, 3 E.A.D. 718, 722 (CJO 1991). It is well established that, as a general rule, "ignorance of the law is no excuse." *See, e.g., United States v. Int'l Mineral & Chems. Corp.,* 402 U.S. 558, 562-63 (1971). A person may be liable under TSCA without any showing of the respondent's knowledge of either the legal requirement or the facts constituting the act or omission alleged to violate the requirement. *See, Staples v. United States,* 511 U.S. 600, 618 (1994); *In the Matter of Ronald H. Hunt, Patricia L. Hunt, David E. Hunt, J. Edward Dunivan, Genesis Properties*, *Inc.,* Docket No. TSCA-03-2003-0285, Order on EPA's Motion for Accelerated Decision, Motion to Withdraw, and Motion to Reschedule Hearing, p. 9 (ALJ, July 2, 2004). As such, I find no merit to Respondent's assertion that the alleged lack of notice and his knowledge as to the requirements under the RLBPHRA and the Disclosure Rule constitute a defense that defeats liability.

In his Response, Respondent raises two additional arguments concerning the existence of genuine disputes of material fact. First, Respondent maintains with respect to Lease Transaction #10 that he mistakenly understood the Clearance Examination Report as resolving the lead paint issues for 713 North Duke Street, Apartment #2. Response at ¶ 51 and at 8-9.

In Count 1, the EPA alleges that Respondent offered the target housing at 713 N. Duke St., #2 in Lancaster, Pennsylvania for lease, and, on or about November 10, 2005, entered into a written lease (Lease Transaction #10) that was not a renewal of an existing lease for a term exceeding 100 days.[1/] Complaint at ¶¶ 50-52. Complainant alleges that Lease Transaction #10 does not indicate that the lessor provided the lessee with an EPA-approved lead hazard information pamphlet or an equivalent pamphlet prior to the lessee being obligated under the contract to lease the target housing. Complaint at ¶¶ 65-67; see Motion at 31.

While admitting that he executed the lease, Respondent argues that he had received a Clearance Examination Report for the referenced rental unit from a certified inspector within two days of the Lease Transaction #10. Respondent claims to have performed the required lead abatement work prior to obtaining the Clearance Examination Report. Respondent contends that pursuant to 40 C.F.R. § 745.101(b), leases 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 travel certification program are excluded under the requirements of 40 C.F.R. part 745, subpart F. Answer at ¶ 66. Respondent argues that it believed that the Clearance Examination Report meant that he was exempt from complying with the

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[2/] The Complaint states that the written contract identified as Lease Transaction #10 was dated November 10, 2005, but the Lease Transaction chart in the Complaint, as well as the Motion, states that the lease was dated October 10, 2005. Complaint at ¶¶ 18, 50; Motion at 31.

notification requirements under the Disclosure Rule, 40 C.F.R. part 745, subpart F. Answer at ¶ 66; Response ¶ 51.

In response, Complainant argues that Respondent's exemption assertion is based on a selective reading of the Clearance Examination Report. In support of this argument, the EPA points to the Clearance Examination Report itself, specifically, the second page which states, "Please be advised that Lead is still present in this property." Proposed Complainant's Exhibit ("CX") 2. I. Therefore, Complainant contends that Respondent was on notice that the property was not lead-based paint free and therefore not exempt from complying with the requirements of the Disclosure Rule. Motion at 31.

Finally, Respondent argues that there is a genuine dispute of material fact concerning Respondent's compliance with the RLBPHRA and the Disclosure Rule with respect to Lease Transactions 3, 4, 5, 7, 8, 9, 12, 13, and 14. Response at 8. Respondent contends that the leases in these cited transactions were "in artfully [*sic*] drafted by directing the tenant to check one of three boxes acknowledging receipt of the required notifications" "rather than all that applied regarding the required notices." Response at 8, 10. Respondent thus argues that he provided the required notices under the Disclosure Rule, 40 C.F.R. part 745, subpart F, for Lease Transactions 3-5, 7-9, and 12-14. Response at 8-10. Also, Respondent avers that in some instances he provided the required information within 24 hours of executing the lease, that there were multiple copies of the leases, and at least one of those copies was properly executed by the tenant.

At first blush, I see little merit to Respondent's arguments in regard to liability. Nevertheless, in the context of an accelerated decision, I must view the evidentiary material and all reasonable inferences therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526 at 528. Although Complainant claims that Respondent was subject to the disclosure requirements of subpart F, there is a clear dispute between the parties as to whether the exception for lead-based paint free target housing under 40 C.F.R. § 745.101(b) should apply. Respondent should be afforded the opportunity to explain at an evidentiary hearing how he interpreted the Clearance Examination Report. *See In the Matter of Minor Ridge, L.P., d/b/a Minor Ridge Apartments*, Docket No. TSCA-07-2003-0019, Order on Respondent's Motion to Dismiss (ALJ March 26, 2002) (holding that the issue of whether Respondent fully complied with the Section 745.101(b) exception by receiving a finding from a state-certified inspector that its housing was lead-based paint free was a genuine issue of material fact requiring an evidentiary hearing). Respondent may also present testimony and/or exhibits at the hearing concerning his argument that his "in artfully [*sic*] drafted" leases complied with the regulations and that he provided the required notices to the lessees. Respondent has met the minimal threshold for defeating the motion for accelerated decision by raising genuine issues of material fact that affect all counts of the Complaint.

Finally, even if I were to find sufficient evidence to support an accelerated decision on liability, the issue of the nature, circumstances, extent, and gravity of the violations alleged, and the degree of culpability for purposes of the penalty may be closely related to the liability phase of the hearing. There would likely be a significant overlap in liability-related and penalty-related evidentiary material, and therefore judicial economy would be better served by analyzing both liability and the penalty in the evidentiary hearing.

Accordingly, based on the record before me, I am compelled to find that genuine issues of material fact exist concerning Respondent's alleged liability under the lead-based paint disclosure requirements in 40 C.F.R. part 745, subpart F. As such, Complainant's Motion for Accelerated Decision as to Liability is **DENIED** as to all counts. Although I have denied accelerated decision, I emphasize that such denial does not decide the ultimate truth of the matter, but represents a threshold determination that an evidentiary hearing is necessary and that Respondent has not established that he is entitled to judgment as a matter of law.

ORDER

1. Complainant's Motion for Accelerated Decision is **DENIED.**

2. The hearing scheduled for March 10 and continuing through March 11, 12, and 13, if necessary, in Philadelphia, Pennsylvania, will go forward.

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Barbara A. Gunning
Administrative Law Judge

Dated: March 2, 2009
Washington, DC