

**Matter of City of New York v 154-09 33rd Ave
Flushing**

2008 NY Slip Op 30371(U)

January 22, 2008

Supreme Court, Queens County

Docket Number: 0022535/2007

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

-----X

**In the Matter of the Application of
The City of New York and the New York
Department of Environmental Protection,
Plaintiffs**

-against-

**154-09 33rd Ave FLUSHING,
Defendant.**

-----X

**Action 1
Index No. 22535/07
Motion Date: 1/16/08
Motion Cal. No. 13**

**In the Matter of the Application of
The City of New York and the New York
Department of Environmental Protection,
Plaintiffs**

-against-

**33-42 153rd St. Flushing,
Defendant.**

-----X

**Action 2
Index No. 22536/07
Motion Date: 1/16/08
Motion Cal. No. 14**

The following papers numbered 1 to 22 read on these applications by defendant for an order compelling plaintiffs to return all material seized by plaintiffs at defendants' premises. Motion Calendar numbers 13 and 14 are consolidated for purposes of disposition. This order is to be filed under Action 1.

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Upon the foregoing papers it is ordered that these applications by defendant, Marcello Valenzano for an order compelling plaintiffs to “return all seized materials immediately for Defendant’s sale to his customers for the winterizing of their pools” and for an order staying both actions pending defendant having “a chance to defend before a Court of competent jurisdiction.” These materials were taken from Valenzano’s home and work place on September 13, 2007. Defendant claims that a Mr. Catanzaro, the Deputy Director of the Division of Emergency Response and Technical Assessment with the New York City Department of Environmental Protection, (hereinafter, “DERTA”) has compromised the health and safety of the swimming pools of more than 1,000 of his customers by denying them access to defendant’s chemicals. Defendant also claims that the seizure of the chemicals was not authorized and was the result of more than “100 violations” of defendant’s Constitutional rights and “the War powers granted by his agency and Orders of this Court.” Defendant’s claims in both applications stem from the same facts and involve identical legal arguments and therefore their consolidation was appropriate.

Plaintiffs oppose the granting of Marcello Valenzano’s applications to return hazardous substances legally seized, and subsequently destroyed, from Valenzano’s home and work place on September 13, 2007. According to plaintiffs, the Department of Environmental Protection (hereinafter, “DEP”) acted as it did because Valenzano was storing large amounts of dangerous chemicals in an illegal and unsafe manner, creating an immediate threat to the public safety. Plaintiff’s argue that the applications are without merit. First, the material were destroyed, rendering these applications academic. Second, Valenzano’s effort to commence due process and civil rights claims or to seek compensation also fail because he has not, by any commenced a legal proceeding against the City of New York. Third, plaintiffs argue that Valenzano has no right to the return of these chemicals because DEP lawfully seized them, his due process rights were not violated because he had no legal right to possess them, and he has not state any cognizable legal claim for compensation or their return.

Plaintiffs have submitted, *inter alia*, an affidavit of Mr. Catanzaro and the defendant’s submissions that establishes defendant has operated a pool supply and cleaning business out of a residential home located in a residential neighborhood in Queens at 33-42 153rd Street, Flushing, New York (the “153rd Street Site”). The home was not equipped for a chemical storage facility and defendant stored large quantities of unregulated and hazardous pool cleaning chemicals at the 153rd Street Site, his residence at 154-09 33rd Avenue, Flushing, New York (“33rd Avenue Site”), and in unmarked trailers on public streets around Queens. These chemicals posed a danger to public safety because some can release dangerous and deadly gases, and others are highly corrosive and can severely burn skin. These chemicals were neither permitted, registered

nor stored in compliance with any applicable regulations.

On May 18, 2007, two members of DERTA investigated the 153rd Street Site as a result of an anonymous call, and were given permission by defendant to search the site. This search revealed 375 pounds of highly concentrated sodium hypochlorite, 128 ounces of acid wash, and 50 pounds of pH Minus acid; According to Mr. Catanzaro, these chemicals can produce toxic chlorine gas when mixed with acidic compounds and exposure to this gas can destroy the respiratory system and result in serious injury or death. Defendant was not able to provide the DERTA responders an inventory of all chemicals in his possession. On May 24, 2007, DERTA responders returned to the 153rd Street site and seized 10 pounds of calcium hypochlorite; 28 pounds of cyanuric acid; 160 ounces of sulfuric acid; over 15 pounds of pH 12-13; 50 pounds of pH13; and several empty two-gallon containers that contained sodium hypochlorite residue from that location. These chemicals are also highly dangerous. On the 24th, defendant informed the DERTA responders about a second storage location near 19th Avenue and 37th Street in Astoria, Queens, that was an unmarked trailer parked on the street and found to contain more than 228 gallons of sodium hypochlorite, a highly corrosive and reactive chemical that burns skin and, when mixed with other compounds, produces toxic gas.

DERTA issued a second Commissioner's Order (the "May 24 Order") directing Valenzano to, among other things, to remediate the hazardous condition and to provide information regarding all chemicals that were present at the 153rd Street site on May 18th, the date of the original investigation. DEP seized the chemicals and hired a hazardous materials contractor who removed and disposed of them. On May 25, DERTA issued violations to Valenzano.. On May 30, 2007, DERTA responders and an FDNY Inspector inspected the 153rd Street Site and observed approximately 40 pounds of sodium hypochlorite being delivered to the 153rd Street Site. On that day, DERTA issued three additional violations to Valenzano for failing to comply with the May 24th Order. On June 1, 2007, DERTA issued their third Commissioner's order to Valenzano, including the requirement that he cease the storage, sale, or acceptance of any chemical delivery ("June 1 Order"). On June 22, 2007, DERTA responders and an FDNY Fire Inspector conducted a follow up inspection at the 153rd Street site and observed 27 pounds of calcium hypochlorite, 32 pounds of pH increaser, and 4 gallons of concentrated sodium hypochlorite in plain sight. The chemicals were removed and properly disposed of by a certified hazardous waste company. Between June 26 and July 5, DEP issued sixteen notices of violation to Valenzano for his repeated failure to comply with the aforementioned Commissioner's Orders. On July 6, 2007, DERTA received an anonymous call regarding pool chemicals stored in a trailer located at 30-05 Whitestone Expressway. The trailer belonged to Valenzano, who opened it and permitted its inspection by DEP. The trailer contained 4 gallons of hydrochloric acid; 4 gallons of sodium hypochlorite; and 18 gallons of a flammable pool

sealant. The chemicals were removed and disposed of by DERTA contractors.

Based on the above, on September 10, 2007, DEP applied for two Ex Parte Administrative warrants in Queens County Supreme Court in order to execute a comprehensive search of both sites. This Court signed orders issuing both warrants. DERTA, accompanied by the NYPD, executed the two search warrants on September 13, 2007. Among the items found and seized as a result of the search warrants were 2300 containers with residual sodium hypochlorite, 12 thirty-two ounce containers of Dimethyl Benzil Ammonium (algacide), 36 one-pound containers of Sodium Bisulfate (pH decreaser), 8 fifty-pound containers of copper sulfate pentahydrate, 3 one-gallon and 1 five-gallon container of 47.8% xylene, 20 fifty-pound containers of aluminum sulfate, 1 five-gallon container of sodium bisulfate, 1 forty pound container of aluminum sulfate; 1 fifty pound container of sodium thiosulfate; 1 five pound container of copper sulfate, 9 two and a half pound containers of potassium peroxy-monosulfate, 1 twenty-three ounce container of alkyl dimethyl benzyl ammonium chloride, and 1 acetylene cylinder. These chemicals were all seized and subsequently destroyed since they were too voluminous to be stored by DEP. Ten notices of violation were also issued to Valenzano.

On September 20, 2007, defendant filed the instant applications in the proceedings related to the Administrative Warrants issued by this Court. These applications do not contain any admissible evidence that refutes the above facts. In fact, defendant's claims are supported only by his unsubstantiated claims that the seized chemicals did not pose a safety or health threat.

The branches of the applications seeking the return of the hazardous chemicals seized by DEP in September 2007 pursuant to two valid administrative warrants signed by this Court are denied as academic since the chemicals were lawfully destroyed by DEP. It is well established that an action that seeks the return of seized property that has either been destroyed or is no longer in the defendant's possession is moot and, therefore, non-justiciable. CPC Int'l v. Jake's Prods., 82 N.Y.2d 915, 916 (1994)

The branch of the applications seeking a "jury trial" are denied because defendant has failed to properly commence an action and, even if he had commenced an action, he did not fulfill any of the procedural requirements to demand a jury trial. In order to demand a jury trial, defendant was required to file a note of issue and pay the appropriate fee. CPLR § 4102 ("A demand shall not be accepted for filing unless a note of issue is filed in the action. If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties."); *See also* New York Unified Rules, Trial Court § 202.21. In addition to having failed to bring an action against the City, Valenzano did not file a Note of Issue nor did he pay the proper fee to demand a jury trial.

The branches of the applications seeking to recover monetary damages are denied. It is

clear that the DEP Acted Reasonably Pursuant to a Court Order and its Statutorily Granted Discretionary Authority. The New York City Administrative Code grants DEP broad discretionary power to implement any response measures deemed necessary to prevent a release of hazardous substances into the environment and protect the public health and welfare. Section 24-608 of the Administrative Code states that, in pertinent part:

[w]hen the commissioner has reason to believe that there has been a release or there exists a substantial threat of a release into the environment of a hazardous substance which may present an immediate and substantial danger to the public health or welfare or the environment, the commissioner may, in his or her discretion, order any or all responsible persons to implement any response measures...deemed by the commissioner to be necessary to protect the public health... . Administrative Code §24-608(a).

The Administrative Code explicitly grants DEP the authority to remove substances that pose a danger to public health. Pursuant to its police power, a municipality may seize and destroy property that is deemed a danger to the public welfare. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950) Here, the DEP seized and destroyed the chemicals to protect the public welfare. Significantly, these materials were properly seized pursuant to an order of DEP's Commissioner and, subsequently, by a valid Order of this Court. These Orders were proper since these chemicals were not stored pursuant to DEP or FDNY regulations. §§24-706 §24-711, and §27-4010 of the New York City Administrative Code. Finally, the defendant ignored DEP's requests that he voluntarily dispose of the chemicals. He failed to follow three Commissioner's Orders requiring him to immediately cease their storage and to immediately provide a chemical inventory to DEP pursuant to the agency's Right to Know Laws. 24 Ad. Code, §§706, 711. As such, it is clear that the City acted reasonably and in full compliance with the law in seizing the chemicals pursuant to Administrative Warrants issued by this Court and Orders authorized by DEP's Commissioner.

The branches of the applications claiming constitutional violations are denied. Defendant has failed to state any legally cognizable claim. This is a result of defendant not being able to establish property rights to the hazardous substances found on his property. In any event, the procedures afforded defendant to dispute the claims and actions by the City gave him an opportunity to be heard at an Administrative hearing, that was clearly explained to be his right on each violation issued to him. Accordingly, he has no due process claim against the City since a person has no property rights to items he or she illegally possesses. Additionally, defendant had no permit regarding the chemicals storage or sale. Moreover, defendant failed to submit the required chemical inventory to DEP and did not follow any of DEP's safety regulations regarding

their storage. Indeed, defendant failed to adhere to orders from DEP that he was storing dangerous chemicals in violation of the law. As such, defendant was illegally possessing these chemicals in a manner that posed a public danger and cannot have property rights that are entitled to protection. Accordingly, he has no viable due process claim. Furthermore, defendant has no right to conduct an illegal and unsafe business.

The branches of the applications seeking an order compelling DERTA to provide a detailed inventory of the seized chemicals is denied. The DEP is not required to provide an owner an inventory of the items seized by DEP. In any event, plaintiffs have provided defendant with a list of all the chemicals, their quantities, and the dates they were seized. This listing is, in essence, a de facto inventory of all the chemicals seized by DEP. Accordingly, no such order is warranted.

The Court also finds that defendant's trade secret claim is without merit. In order to claim trade secret protection under DEP's Community Right to Know Law regulations, a party must file a trade secret claim under § 322 of the Federal Emergency Planning and Community Right-to-Know Act of 1986, Article 48 of the State Public Health Law, or Article 28 of the Labor Law. 15 RCNY §41-06. Defendant has not, identified any chemicals that are legally protected trade secrets. Furthermore, the assertion of a trade secret claim does not exempt a party from DEP's Community Right to Know filing, (15 RCNY §41-06) and defendant did not file any of the above mentioned documents and, therefore, he cannot claim trade secret protection.

The Court also finds that defendant's claims that DEP never responded to his requests made pursuant to Article 6 of the New York State Public Officers Law (hereinafter referred to as the "Freedom of Information Law" or "FOIL") are without merit. There is no evidence that defendant requested documents under FOIL and, therefore, any claim that DEP failed to comply with FOIL must fail. He did submit several written discovery requests to DEP regarding an upcoming hearing in front of the Environmental Control Board ("ECB"). There is sufficient evidence to show that the DEP fully responded to these discovery requests by letter dated August 6, 2007. DEP's response provided Valenzano with all documents in the agency's possession that he is entitled to pursuant to the Rules of the City of New York, including the following: (1) a Technical Report dated July 30, 2007 regarding DEP's May 18, 2007 chemical seizure at 33-42 153rd Street in Flushing, Queens; (2) DEP photographs taken at that time of that seizure; (3) sample results of the seized chemicals; (4) Valenzano's expired Material Safety Data Sheets; and (5) a copy of the applicable law. These documents constituted the entire collection of documents requested by Valenzano in DEP's possession at the time of this request. The DEP has stated that it will continue to comply with its discovery obligations under 15 RCNY § 31-37 and it has not withheld any final documents requested by Valenzano that he is entitled to under these

provisions, and it will provide defendant with the remaining discoverable documents as soon as they are finalized.

Based upon the above, the applications under Index Numbers 22535/07 and 22536/07 are denied in their entirety. .

DATED: JANUARY 22, 2008

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ORIN R. KITZES, J.S.C.