DISTRICT OF COLUMBIA
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DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS Petitioner, v. JEAN S. LEE Respondent	Case Nos.: PW-V-07-K131748 PW-V-07-K132656 PW-V-07-K132664 PW-V-07-K134018 PW-V-07-K136542 PW-V-07-K137141 (Consolidated)

FINAL ORDER

I. Introduction

On April 9, April 12, April 18, June 4, July 24, and September 19, 2007, the Department of Public Works ("DPW") served Notices of Violation upon Respondent Jean S. Lee, alleging that she violated 21 DCMR 700.3, which requires solid waste to be stored properly. The Notices charge that the violations occurred at the rear of 610 H Street, N.W., on April 5, April 10, April 17, May 22, July 20, and September 12, 2007. Four of the Notices (Nos. 132656, 134018, 136542 and 137141) seek a fine of $150; the remaining Notices seek enhanced fines because the alleged violations occurred within 60 days of each other. Notice No. 132664 seeks a fine of $300 for a violation allegedly occurring on April 10, 2007, and Notice No. 131748 seeks a fine of $600 for a violation allegedly occurring on April 17, 2007. The total amount sought by DPW, therefore, is $1,500.

Ms. Lee filed timely pleas to each of the Notices. She pleaded Admit to the first Notice, (No. 132656), which alleged a violation on April 9, 2007, and paid the fine of $150. She pleaded Deny to each of the other Notices, however, and also sought a refund of the $150 she paid with her plea of Admit. I have treated that request as a motion for reconsideration, asking that her plea be withdrawn.

I held a hearing in these matters on February 6, 2008. Alaina Johnson and Kenneth Milner, the inspectors who issued the Notices of Violation, appeared on behalf of DPW. James Hammerschmidt, Esq., appeared on behalf of Ms. Lee. Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Ms. Lee owns both 608 and 610 H Street, N.W.[1] Those properties have been designated Lots 828 and 827, respectively, in Square 454. On each of the days in question, *i.e.*, April 5, April 10, April 17, May 22, July 20, and September 12, 2007, a dumpster overflowing with trash was present in the vicinity of both properties. Ms. Lee leases one of the properties to a restaurant, which shares the dumpster with another nearby restaurant. There is no evidence that Ms. Lee herself used the dumpster at any time for trash disposal. The only disputed issue in this case is whether the dumpster was on Ms. Lee's property on the dates in question.

[1] It appears that Ms. Lee owns those properties along with several co-owners. The identity of the co-owners and the extent of their ownership interests are not material to the disposition of this matter.

Although the Notices of Violation charge that each violation occurred at 610 H Street, N.W., at the hearing the parties focused their attention upon 608 H Street, N.W.[2] While Ms. Lee testified that the building at 608 extends from the property line of 610 to the property line of 606 H Street, the photographic evidence does not support that testimony. In particular, Respondent's Exhibit ("RX") 200-3, a photograph taken from the roof of an adjoining property, shows that the portion of the building at 608 that fronts on H Street occupies the entire width of Lot 828, but the building narrows toward the back of the lot. The entire building is not depicted in RX 200-3, but one can combine RX 200-3 and RX 200-4 to see the entire building on Lot 828. When those two photographs are examined together, it is apparent that only the front half of the building at 608 extends to the wall of the building at 606 H Street. At the rear half of the building, there is a gap of approximately 5 to 10 feet between the building wall and the property line.

Based on the photographs in evidence, Petitioner's Exhibits ("PX") 105-09, I find that, on the days in question, the dumpster was aligned within that 5 to 10 foot gap. In other words, I credit the testimony of Ms. Johnson that the dumpster was behind 608, and I do not credit Ms. Lee's testimony that it was behind 604 H Street.

This does not end the matter, however, for the next question that must be answered is "how far behind?" In particular, was the dumpster beyond the rear boundary line of Ms. Lee's property at 608? Here again, comparison of the photographs offered by Ms. Lee with the photographs offered by DPW provides the answer. RX 200-3 and 200-4 were taken from the roof of a large neighboring building. That building is adjacent to 610, but also extends behind both 610 and 608. The area of that building behind Ms. Lee's properties does not have a ground

[2] In the remainder of this Order, I will refer to the properties only by address number, *i.e.,* "608" and "610."

floor. In that area, the building is supported by pillars, as shown in RX 200-4. Those pillars are beyond the rear property lines of 610 and 608. One of those pillars also is shown in most of the photographs taken by the DPW inspectors on the dates in question, *i.e.,* in PX 105 through 108. In each of those photographs, the dumpster is entirely beyond the pillar, *i.e.,* a person walking from the rear of 608 would pass the pillar before coming to the dumpster. This means that the dumpster was outside the rear property line of 608 when the photographs were taken.

The pillar is not visible in PX 109, a photograph taken on April 5, 2007. In that photograph, the dumpster is next to a chain link fence, between an opening in the fence and the next fence post. Comparison of that photograph with both RX 200-4 and PX 105-108, all of which show the fence, reveals that area of the fence is beyond the pillar. Therefore, the dumpster shown in PX 109 also is beyond the pillar, and beyond the rear property line of Ms. Lee's property.[3]

III. Conclusions of Law

A. Preliminary Issues

Each of the Notices of Violation charges Ms. Lee with violating § 700.3 at 610. Each Notice also identifies the property at issue as Square 454, Lot 827. At the hearing, however, DPW contended that the dumpster was present at 608, at Square 454, Lot 828, and Ms. Lee defended on the ground that the dumpster was not present at 608.

[3] Interestingly, RX 200-4 shows two dumpsters near the fence, one of which appears to be at least partially on Ms. Lee's property. RX 200-4 was not taken on any of the days at issue, and no trash is overflowing from the dumpster in that photograph. RX 200-4, therefore, does not support DPW's claim that there was a violation on any of the days at issue in this case.

Because there is a clear discrepancy between the charge in the Notices of Violation and the proof presented at the hearing, I must decide whether the charges should be dismissed. While the Litter Control Administration Act provides that a Notice of Violation must identify the location where a violation allegedly took place, D.C. Official Code § 8-803(d)(1), the erroneous identification of 610 H Street as the location of the violation is not grounds for dismissal in the circumstances of this case. Both sides came prepared to try, and did try, the question whether the dumpster was at 608 on the days in question. Neither side objected to any evidence about the property lines of 608 on the ground that 610 was the only relevant location. In these circumstances, I am guided by Superior Court — Civil Rule 15(b), which provides, in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.[4]

Because both parties failed to object to evidence about the property lines of 608, and, indeed, explicitly argued about those property lines, I conclude that the parties impliedly consented to try the location of those property lines at the hearing. If these cases were dismissed because there was no evidence of a violation at 610, DPW would be free to issue new Notices of Violation alleging a violation at 608, and the parties would be required to return for a new hearing on the issue that they already have tried. Rule 15(b) exists to avoid such a waste of both the parties' and OAH's resources. Therefore, as authorized by Rule 15 (b), I shall treat the question whether there was a violation at 608 as if it had been raised in the Notices of Violation.

[4] Pursuant to OAH Rule 2801.2, 1 DCMR 2801.2, I may rely upon analogous Superior Court Rules of Civil Procedure to decide procedural issues such as the present one when no OAH rule is applicable.

The second preliminary issue is whether Ms. Lee may deny liability for the April 9 violation (Notice No. 132656) even though she already has pleaded Admit and paid the fine. Here, too, the Superior Court Civil Rules provide an appropriate standard. Ms. Lee essentially is asking to amend her response to the Notice of Violation. Superior Court – Civil Rule 15(a) provides an appropriate standard for evaluating her request:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Ms. Lee's answer to the Notice of Violation is analogous to a "pleading" within the meaning of Rule 15(a). Because no response is required to a respondent's plea in a Litter Control Administration Act case, OAH Rule 2813, 1 DCMR 2813, application of Rule 15(a) would permit her 20 days to amend that plea. Since her request for a refund was received within that period, the request was timely, and the amendment of her plea from Admit to Deny will be allowed.

B. Liability for the Violation

DPW has charged Ms. Lee with violating 21 DCMR 700.3, which provides:

> All solid wastes shall be stored and containerized for collection in a manner that will not provide food, harborage, or breeding places for insects or rodents, or create a nuisance or fire hazard.

Ms. Lee stipulated that the overflowing dumpster violated § 700.3 on each of the days in question. The only disputed issue is whether Ms. Lee is responsible for those violations. DPW's

theory is that Ms. Lee is strictly liable for the actions of her tenant who disposed of its trash in the dumpster. While § 700.3 is a strict liability provision, the evidence in this case does not support extending strict liability to Ms. Lee.

The Court of Appeals has held that § 700.3 imposes strict liability upon an owner of property where a violation occurs, regardless of the source of the solid waste. *Gary Investment Corp. v. District of Columbia Department of Health,* 896 A.2d 193, 197-98 (D.C. 2006); *Bruno v. District of Columbia Board of Appeals and Review*, 665 A.2d 202, 204 (D.C. 1995). Therefore, if Ms. Lee owned the property where the dumpster was situated, she would be liable for violating § 700.3, even though she did not dispose of any trash into the dumpster. Because I have found that the dumpster was not on her property, however, there is no basis for holding her liable. Contrary to DPW's argument, Ms. Lee is not strictly liable for every § 700.3 violation committed by her tenant; she is liable only for § 700.3 violations committed on her property, whether by her tenant or anyone else. Because no such violation occurred on her property, the Notices of Violation must be dismissed, and her payment of the fine for Notice No. 132656 must be refunded.

IV. Order

Based on the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2008:

ORDERED, that Ms. Lee is **NOT LIABLE** for violating 21 DCMR 700.3 as alleged by DPW, and each of the Notices of Violation is **DISMISSED WITH PREJUDICE;** and it is further

ORDERED, that that the Clerk's Office shall submit a refund memorandum to the Office of the Chief Financial Officer calling for issuance of a check payable to Jean S. Lee, 120 Tinker Drive, Fort Washington, MD 20744 in the amount of $150 in accordance with applicable laws, regulations, and procedures for such refunds; and it is further

ORDERED, that any party may exercise the appeal rights set forth below.

_____**/s/ 2/20/08**_____
John P. Dean
Principal Administrative Law Judge