

ASTON'S MINING LAW CASE REVIEWS™

R. Lee Aston



*Ph.D., D. Eng., J.D. LL.M., Attorney,
Mining & Geological Engineer
Aston Mineral Law & Engineering Div.,
Aston Law Offices-Ga., Va., Ind., Mont.,-Attorneys-at-Law,
P.O. Box 34, Elberton, Georgia 30635 USA
E-mail: leeaston@negia.net*

Jurisdiction : United States

Aston's Complimentary Case # 7-05-02

SURFACE MINE RECLAMATION FINES IMPOSED ON OPERATOR WHILE MINE OWNERS SQUABBLE AS TO LIABILITY

Case Synopsis :

In *John Cahill, as Commissioner of the New York State Department of Environmental Conservation, et al., Respondents, v. Michael P. Harter et al., Appellants*, 277 A.D. 2d 655 (2000), the New York State Department of Environmental Conservation (hereafter, DEC) sought enforcement of a reclamation fine levied against Michael P. Harter, who allegedly operated a mining site Otsego County, N.Y. The lower court granted DEC summary judgement and plaintiffs' motion for additional civil penalties for \$100,000 against defendants. Defendants appealed and the Supreme Court affirmed the trial court's order.

Background Facts :

Harvey Sand and Gravel, Inc. and its president, defendant Michael P. Harter, operate a mining site in the Town of Oneonta, Otsego County. In October 1991, defendants and plaintiff DEC entered into a consent order which resolved issues concerning defendants' violations. In late 1993, DEC commenced an administrative enforcement proceeding alleging that defendants had violated and continued to violate the 1991 consent order. Following a hearing, the Administrative Law Judge (hereinafter ALJ) found defendants in violation of the 1991 consent order by, *inter alia*, failing to reclaim designated areas and failing to secure a reclamation bond in the amount of \$ 54,600. In January 1995, plaintiff Commissioner of Environmental Conservation adopted the ALJ's findings, ordered defendants to comply with the 1991 consent order and assessed civil penalties jointly and severally against defendants. Defendants never instituted a proceeding challenging the consent order or the Commissioner's administrative order. (@655.)

In view of defendants' continuing violations of the orders, plaintiffs commenced this action to enforce the terms of the consent order, the 1995 administrative order, and seeking additional civil penalties. The plaintiffs moved for summary judgement, as well as a permanent injunction enjoining defendants to desist in any further mining activities. The trial court granted the motions and ordered defendants to provide a surety bond in the amount of \$ 54,600 to ensure proper reclamation of the site. Following a hearing, the trial

court also upheld a \$75,000 civil penalty imposed by the Commissioner and imposed an additional civil penalty of \$ 25,000 for continuing violations of the Commissioner's order. Defendants appealed.

The Appeal courts' Analysis

On appeal, defendants belatedly challenged the consent order and the administrative order, contending, that they are not proper parties to this action on the ground that regulation allegedly violated (ECL article 23) imposes liability only upon those holding a mining permit. They argued that they are merely the agents of the actual permittee, Strata Stone Products, Ltd., and not a principal in Strata. Inasmuch as this argument is raised for the first time on appeal, it is unpreserved for this Court's review. Harter argued and referred repeatedly throughout his affidavit to Harvey Sand and Gravel, Inc. as the permittee, and not to Strata Stone Products.

Regardless, if defendants were not the permittee of the mine at issue, their argument in this respect was not raised before the trial court; further, if it had been raised, it would not have been successful in defeating a motion for summary judgement where defendants had failed to properly challenge, either the 1991 consent order, or the 1995 administrative order by timely commencing a CPLR article 78 proceeding (citations omitted). Having failed to avail themselves of that procedure, the court held that the defendants could not now collaterally attack the propriety of the orders in this enforcement proceeding (citations omitted).

The court added that since the defendants failed to raise any material issue of fact concerning their continuing violation of the orders, which plaintiffs had demonstrated by unrefuted evidentiary proof, the trial court properly granted summary judgement in favor of plaintiffs (citation omitted).

The Appeal Decision

With respect to the civil penalties imposed by DEC on defendants, the appeal court held that none of their appeal arguments specifically challenged that order and, accordingly, the appeal from that order is deemed abandoned.

The orders of the trial court were affirmed and appeal denied.
