IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, ***Plaintiff,*** **v.** **RODGERS BROTHERS CUSTODIAL SERVICES, INC.,** ***et al.,*** ***Defendants.***	**Case No. 2021 CA 000109 B** **Judge Danya A. Dayson**

ORDER

Before the Court is the District of Columbia's ("The District") Motion for Summary Judgment, filed June 16, 2022, and Defendants Rodgers Brothers Custodial Services, Inc.'s ("Rodgers Brothers") and George Rodgers, Jr.'s (collectively, "Defendants") Cross-Motion for Summary Judgment, filed July 25, 2022. Upon consideration of the motions, the oppositions and replies thereto, and the entire record, and for the reasons contained herein, the District's Motion is granted in part, and the Defendants' Motion is denied.

BACKGROUND

The District brought the instant action on January 14, 2021, against Defendants, alleging violations of the District's Water Pollution Control Act ("WPCA"), D.C. Code §§ 8-103.01 *et seq*. The District seeks a declaratory judgment that Defendants violated the WPCA, a preliminary and/or permanent injunction enjoining Defendants from violating the WPCA, and statutory penalties under the WPCA.

On June 16, 2022, the District filed its Motion for Summary Judgment, alleging that the Defendants are liable for five WPCA violations during the relevant period, and that the Defendants

are liable for the maximum civil penalty. The District further argues that Rodgers Brothers should be permanently enjoined from engaging in future conduct likely to lead to WPCA violations.

On July 25, 2022, the Defendants filed their Opposition Brief and Cross-Motion for Summary Judgment ("Defs.' Opp'n"), arguing that a 2012 agreement between the parties bars the instant action, the maximum penalty is unwarranted, and that there is an adequate remedy at law that precludes injunctive relief. On August 5, 2022, the District filed its Opposition to Defendants' Motion for Summary Judgment and Reply in Further Support of the District's Motion for Summary Judgment ("Dist.'s Opp'n"). On August 19, 2022, the Defendants filed their reply to the District's Opposition to Defendants' Motion for Summary Judgment ("Defs.' Reply").

LEGAL STANDARD

Rule 56(a) of the Superior Court Rules of Civil Procedure provides in relevant part, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56(a).

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Superior Court rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C. 2008) (quotations and citations omitted). "Summary judgment may have once been considered an extreme remedy, but that is no longer the case," and indeed District of Columbia courts have "recognized that summary judgment is vital." *Doe v. Safeway, Inc.*, 88 A.3d 131, 133 (D.C. 2014) (citations omitted).

The moving party has the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1324 (D.C. 1995). "At this initial stage, the movant must inform the trial court of

the basis for the motion and identify 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Paul v. Howard Univ.*, 754 A.2d 297, 305 (D.C. 2000) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

If the moving party carries this burden, the burden shifts to the non-moving party to show the existence of an issue of material fact. *Smith v. Swick & Shapiro, P.C.*, 75 A.3d 898, 901 (D.C. 2013). "A genuine issue of material fact exists if the record contains some significant probative evidence … so that a reasonable fact-finder would return a verdict for the non-moving party." *Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 908 (D.C. 2011) (quotation and citation omitted). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat a motion for summary judgment." *Smith*, 75 A.3d at 902 (quotation and citation omitted). In addition, a party "cannot stave off the entry of summary judgment through [m]ere conclusory allegations." *Id.* (quotation and citation omitted). Rather, the "party opposing summary judgment must set forth by affidavit or in similar sworn fashion specific facts showing that there is a genuine issue for trial." *Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 950-51 (D.C. 2012) (quotation and citation omitted).

Rule 56(c) establishes the requirements for raising a genuine factual dispute in a form that would be admissible in evidence at trial. *See generally* Super. Ct. Civ. R. 56(c). Rule 56(c)(1) provides:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Super. Ct. Civ. R. 56(c)(1). Rule 56(c)(2) further provides, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Super. Ct. Civ. R. 56(c)(2). Rule 56(c)(4) provides, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Super. Ct. Civ. R. 56(c)(4).

Under Rule 56(e)(2) and (3), the Court may, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c)," "(2) consider the fact undisputed for purposes of the motion [or] (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Super. Ct. Civ. R. 56(c)(e)(2)-(3). Depending on the factual and legal context, a party's "failure to explain the basis for [a] claim in opposing summary judgment constitutes a waiver of that claim." *Hodgson v. Nat'l Council of Senior Citizens*, 766 A.2d 54, 58 (D.C. 2001); *see Kibunja v. Alturas, L.L.C.*, 856 A.2d 1120, 1125-26 (D.C. 2004) (holding that failure to file affidavit required by Rule 56 waives claim that trial court should have deferred ruling to allow further discovery).

Viewing the non-moving party's evidence in the light most favorable to it, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hunt v. District of Columbia*, 66 A.3d 987, 990 (D.C. 2013) (quotation and citation omitted). The Court may grant summary judgment only if no reasonable juror could find for the non-moving party as a matter of

law. *Biratu v. BT Vermont Ave., LLC*, 962 A.2d 261, 263 (D.C. 2008). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009).

ANALYSIS

In its motion, the District argues that on at least five occasions from 2016 to 2021, Defendants violated the WPCA by discharging pollution into District waters without a permit. Mot. for Summ. J. at 11-26. The District further argues that the Defendants cannot reasonably dispute these violations, and asserts that Defendant Rodgers is personally liable, in addition to Defendant Rodgers Brothers Inc., for these violations due to his level of control over Rodgers Brothers' operations and his knowledge of the company's practices. *Id*.

In response, the Defendants do not dispute the alleged violations of the WPCA; rather, the Defendants argue that the prosecution of the present case violates an agreement the parties entered into in 2012 ("the Agreement"). Specifically, Defendants argue that the Agreement covers two alleged violations in 2016 and requires advanced notice and a 30-day right to cure, which the District did not provide, in contravention of the Agreement. Opp'n and Cross-Mot. at 9-35.

I. The 2012 Settlement Agreement

The Agreement states, in pertinent part:

> The District shall cease, and shall not initiate, any efforts, including but not limited to administrative, regulatory or judicial actions, to shut down the Rodgers Brothers Facility under the District of Columbia Solid Waste Facility Permit Act ("SWFPA"), D.C. Official Code § 8-1050, *et seq*., or any other subsequent law, rule or regulation and instead shall permit the Rodgers Brothers Facility, or their designees, assigns or successors, to continue to operate its Facility as a C & D storage, processing, sorting and recycling facility or a solid waste handling facility, provided that Rodgers Brothers or their designees, assigns or successors, continue to operate the Facility safely, cleanly, efficiently and in accordance with all District and federal environmental, health, safety and zoning laws for so long as Rodgers Brothers abide by the terms of this Agreement, or through the term of this Agreement, whichever occurs first.

Defs.' Mot. for Summ. J., Ex 1 at ¶ 11.

The District argues that the phrase "any other subsequent law, rule or regulation" relates only to amendments of the SWFPA or rules passed pursuant to that law's authority. The Defendants argue that, under this provision, the Agreement applies not only to suits under the SWFPA, but to any law, rule, or regulation, and that the provision is facially unambiguous. *See Segal Wholesale, Inc. v. United Drug Serv.*, 933 A.2d 780, 784 (D.C. 2007) ("[W]here a document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent.") (internal quotations omitted). Defendants also point to language which requires Rodgers Brothers to operate the Facility "in accordance with all District and federal environmental, health, safety and zoning laws" as further evidence of the parties' intent that the Agreement bars suit under any statute. Def.'s Reply at 10-11.

The District points to contractual language outside this provision which supports evidence of the parties' intent to limit the terms of the Agreement to violations of the SWFPA and subsequent amendments thereto. The District argues that language throughout the Agreement makes reference to the SWFPA: Paragraph H requires Rodgers Brothers to undertake many actions which are to be overseen by the Department of Consumer and Regulatory Affairs ("DCRA"), an agency with authority over the SWFPA. Dist.'s Opp'n at 4-5. The District also points to provisions within the Agreement which refer to the Litigation, defined on the first page of the Agreement as encompassing several proceedings brought under the SWFPA. *Id.* The Defendants point to the District's efforts in enforcing Defendants' alleged violations of the Agreement in its 2018 litigation as evidence that they were covered by the Agreement. Defs.' Reply at 7-8.

In interpreting the text, "it is axiomatic that the words of a statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Allman v.*

Snyder, 888 A.2d 1161, 1168 (D.C. 2005). Where general words follow specific words, the general word or phrase is to be interpreted "to include only items of the same type as those listed." *Nat'l Ass'n of Postmasters of the United States v. Washington*, 894 A.2d 471, 476 (D.C. 2006) ("A common aid for interpreting both statutes and contracts is ejusdem generis: Where general words follow specific words in an . . . enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotations and emphasis omitted); *see also District of Columbia v. Beretta U.S.A. Corp*., 940 A.2d 163, 171 (D.C. 2008) ("[W]here specific words follow general words, application of the general term is normally restricted to things similar to those specifically enumerated").

Taking the plain meaning of the cited contractual language, this Court finds that the parties intended the Agreement to cover Defendants' violations of the SWFPA only. The Defendants' cited authority pertains to determinations of whether the contract at issue is a complete integration of the parties' intent for purposes of the parol evidence rule. *See Segal Wholesale*, 933 A.2d at 784 ("In order to determine whether the parol evidence rule applies in a given case, we look to whether the written agreement was intended to be a complete statement of the terms of the agreement or rather was intended to be something less."). Given that the Court finds that the Agreement does not cover the instant litigation, it also does not find that the District was required to give 30 days' notice to correct. Therefore, the Defendants' Cross-Motion for Summary Judgment is denied. However, given the parties' disputes of fact as to Defendant Rodgers' level of control over Rodgers Brothers' operations, the Court denies the District's Motion for Summary Judgment as to Defendant Rodgers. *See, e.g*. Defs.' Statement of Disputed Facts, ⁋⁋ 44-45, 48.

II. Available Remedies

A. Permanent Injunction

The District requests that the Court enter a permanent injunction against Defendants and require them to continue performing inspections, reporting, and training, as they have done under the consent preliminary injunction. Dist.'s Mot. at 24-26. In opposition to this request, Rodgers Brothers argues that its consent to a preliminary injunction, as well as yearlong compliance with that injunction, are factors which preclude the assessment of a penalty. Defendants also argue that the District has failed to show that there is no adequate remedy at law for their violations, and alleges that it has entered into an agreement to sell the site, rendering a permanent injunction unnecessary. Defs.' Opp'n at 33-34.

The Court finds that the Defendants' compliance with the consent preliminary injunction is irrelevant to its decision of whether to grant a permanent injunction. "Because the defendant is free to return to his old ways, and because there is a public interest in having the legality of the practices settled, it is well established that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *Mbakpuo v. Ekeanyanwu*, 738 A.2d 776, 782 (D.C. 1999) (citing *United States v. W. T. Grant Co*., 345 U.S. 629, 632 (1953)) (internal quotations omitted). Similarly, the Defendants' argument that the District's failure to show the unavailability of an adequate remedy at law bars injunctive relief is unconvincing given the WPCA's express provision to the contrary. D.C. Code § 8-103.18(a)(3) ("In any action under this subsection, upon a showing that any person is violating or is about to violate any provision of this subchapter . . . the court may grant an injunction without requiring a showing of a lack of an adequate remedy at law.").

"While it is true that an injunction must be focused on future conduct, it is equally true that a defendant's past conduct is important evidence—perhaps the most important—in predicting his probable future conduct." *Mbakpuo*, 738 A.2d at 782 (citing *Cruz-Foster v. Foster*, 597 A.2d 927,

930 (internal quotations omitted). "Thus, once the plaintiff makes out a prima facie case of some cognizable danger of recurrent violation, a defendant arguing that an injunction should not be issued because of voluntary cessation of the challenged activity carries the heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated." *Id*. Moreover, the possible sale of the property does not bar injunctive relief, as the relief sought is against the Defendants, and is not specific to the property.

At this stage, the Court finds that the determination of whether to impose a permanent injunction is more appropriate after an evidentiary hearing, and therefore declines to award summary judgment as to this issue.

B. Civil Penalty

The District argues that the Court should assess the maximum penalty allowed by the WPCA due to the Defendants' consistent violations of the WPCA, pointing to the severity and the frequency of the Defendants' violations, as well as their failure to limit or mitigate their violations. District's Mot. at 16-24. The District cites federal case law interpreting the Clean Water Act, the federal WPCA analog, which states that penalties must be significant enough to serve the purpose of specific and general deterrence. The District also cites a case as persuasive authority from the Superior Court which states that courts begin with the maximum civil penalty that could be applied and adjust the penalty downward based upon mitigating factors. *See* J. Pasichow Ord. (Oct. 13, 2021), 2018 CA 004996 B.

The Defendants argue that the maximum penalty is unwarranted because the WPCA's plain language does not allow the Court to consider multiple violations in its consideration of civil penalties and because the Court should consider the Defendants' cleanup efforts as evidence of mitigation. They contend that the District improperly conflates the CWA with the WPCA, and

under the WPCA, the Court is not empowered to consider multiple violations or a history of violations in weighing "seriousness of the violation" under the WPCA. The Defendants argue that "efforts to mitigate the effects of the discharge" means cleanup efforts, rather than a company's future efforts to comply with the WPCA. Defendants finally argue that the District fails to meet its burden to show the amount of the alleged leaks, and that the instant violations were comparatively minor to those in the cases cited by the District. Defs.' Opp'n at 27-30.

Civil penalties are not mandatory under the WPCA, and are traditionally calculated by the trial judge. *District of Columbia v. Miss Dallas Trucking, LLC*, 240 A.3d 355, 359-61 (D.C. 2020); *Tull v. United States*, 481 U.S. 412, 426 (1987) ("In this case, highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act. These are the kinds of calculations traditionally performed by judges."). Under D.C. Code § 8-103.18(b)(2)(C),

> The court shall determine the amount of the civil penalty under this paragraph based on consideration of the following factors: (i) [t]he size of the person's business; (ii) [t]he ability of the person to continue the business despite the penalty; (iii) [t]he seriousness of the violation; and (iv) [t]he nature and the extent of success in the person's efforts to mitigate the effects of the discharge."

Furthermore, federal caselaw interpreting the Clean Water Act is persuasive in interpreting the WPCA, given that the D.C. Council patterned the WPCA after the federal statute. *See* D.C. Council, Report on Bill 5-326; *Miss Dallas Trucking*, 240 A.3d at 361 (citing federal caselaw interpreting the CWA). Civil penalties are "intended to punish culpable individuals and deter future violations, not just to extract compensation or restore the status quo." *Kelly v. United States Envtl. Protection Agency*, 203 F.3d 519, 523 (7th Cir. 2000). "A court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. It may also seek to deter

future violations by basing the penalty on its economic impact." *Tull v. United States*, 481 U.S. 412, 422-23 (1987).

Defendant Rodgers Brothers is charged with five violations of the WPCA in this litigation. Rodgers Brothers is charged with discharge of petroleum as well as sediment, dirt, rock, and excavation materials through leaks and spills. Rodgers Brothers highlights, and the District does not dispute, its adherence to the injunction throughout the pendency of this litigation. Defs.' Opp'n at 20. However, "a suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance." *Natural Resources Defense Council v. Texaco Ref. & Mktg*., 2 F.3d 493, 503 (3d Cir. 1993) (citing *Atlantic States Legal Found. v. Pan Am. Tanning Corp*., 993 F.2d 1017 (2d Cir. 1993). "If penalty claims could be mooted, polluters would be encouraged to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." *Id*. at 1137 (internal quotations omitted).

While the Court finds that there is no genuine dispute as to whether such violations occurred, the Court finds that the parties have a genuine dispute of material fact with regard to the third statutory factor: seriousness of the violation. The Defendants contest whether the District has established that pollutants entered the District's waters, point to their removal of sediment along the fence line of their yard, and argue that their alleged violations are minute and that the District has failed to establish the quantity of the pollutants discharged, unlike in *Miss Dallas Trucking*, where there was expert testimony regarding the effects of dumping 900 gallons of diesel fuel in the Potomac River. There is insufficient evidence to determine the appropriate penalty as a matter of law. The parties' positions reflect a dispute of material fact not appropriate for the Court to

decide at the summary judgment phase. Therefore, the Court finds that its determination of a penalty as a matter of law at this stage is inappropriate.

CONCLUSION

Accordingly, it is this 5th day of January, 2023, hereby

ORDERED that the District's Consent Motion for Leave to File an Opposition to Defendant's Motion for Summary Judgment and Reply in Further Support of the District's Motion for Summary Judgment in Excess of Fifteen (15) Pages is **GRANTED**; it is

FURTHER ORDERED that the District's Motion for Summary Judgment is **GRANTED IN PART** insofar as the District has established liability for violations of the WPCA, but has not demonstrated that it is entitled to a specific penalty, as a matter of law; and it is

FURTHER ORDERED that the Defendants' Cross-Motion for Summary Judgment is **DENIED**.

SO ORDERED.

Judge Danya A. Dayson
D.C. Superior Court