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THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD

HEARING LOCATION:
Environmental Control Board
66 John Street
10th Floor
New York, NY 10038
(212) 361-1400



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Method of Appearance
Live Hearing

DECISION AND ORDER
Violation #: 034825812N et al. (5 NOVs)
Hearing Date: November 19, 2010

To: Cohen and Hochman
80 Maiden Lane
suite 507
NY, NY 10038

City of New York v. BEN CHRIS REALTY
CORP

Total Civil Penalty: \$0.00

5 Notice(s) of Violation (NOV(s)) was/were issued to the Respondent. On the record before me, and upon the Further Findings of Fact/Conclusions of Law stated below, I find as follows and, where applicable, order payment and compliance.

NOV: 034825812N
PLACE OF OCCURRENCE: 1736 RICHMOND AVENUE STATEN ISLAND
DATE OF OCCURRENCE: 02/22/2010
ISSUING OFFICER/AGENCY: 2380 DOB
ECB CODE: B160
CHARGE: AC 28-105.1
DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034825813P
PLACE OF OCCURRENCE: 1736 RICHMOND AVENUE STATEN ISLAND
DATE OF OCCURRENCE: 02/22/2010
ISSUING OFFICER/AGENCY: 2380 DOB
ECB CODE: B165
CHARGE: ZR 32-63
DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034825814R
PLACE OF OCCURRENCE: 1736 RICHMOND AVENUE STATEN ISLAND
DATE OF OCCURRENCE: 02/22/2010
ISSUING OFFICER/AGENCY: 2380 DOB
ECB CODE: B166
CHARGE: ZR 32-64
DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034825815Z
PLACE OF OCCURRENCE: 1736 RICHMOND AVENUE STATEN ISLAND
DATE OF OCCURRENCE: 02/22/2010
ISSUING OFFICER/AGENCY: 2380 DOB
ECB CODE: B169
CHARGE: ZR 32-655
DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034825816K
PLACE OF OCCURRENCE: 1736 RICHMOND AVENUE STATEN ISLAND
DATE OF OCCURRENCE: 02/22/2010
ISSUING OFFICER/AGENCY: 2380 DOB
ECB CODE: B162
CHARGE: AC 28-502.6
DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 034825812N AC 28-105.1 NOV: 034825813P ZR 32-63 NOV: 034825814R ZR 32-64 NOV: 034825815Z ZR 32-655 NOV: 034825816K AC 28-502.6

Mr. Robert Hochman appeared for the Respondent Ben-Chris Realty Corp. Mr. Alex Berger appeared for the Petitioner.

The following five notices of violation were heard in this hearing.

34825812N: 28-105.1

New York City Environmental Control Board

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34825813P: ZR 32-63
 34825814R: ZR 32-64
 34825816K: 28-502.6
 34825815Z: ZR 32-655

The Issuing Inspector J. McKenzie testified that he observed a sign advertising 'Clean Sweep Home Improvements,' on the roof of Casale Tile, a retail store. A Mr. Benedetto Casale is the owner of Casale Tile and one of the owners of Ben-Chris Realty Corp, the named Respondent. The sign did come down at a later time.

Mr. Casale in a notarized letter wrote that in February of 2010, "Clean Sweep approached me for office space in my building at 1736 Richmond Ave, Staten Island. At that time he asked me if he could put a sign on my roof AT NO CHARGE....."

A second notarized letter by a Mr. Paul Discala dated November 15, 2010 was submitted into evidence. Mr. Discala wrote " This letter is to advise you that in February 2010, I was going to rent office space at Casale Tile, 1736 Richmond Ave, Staten Island....I had asked Mr. Casale if I could put my business sign on his roof and he said yes. However, a windstorm blew my sign down in March 2010 and I never put it back up again since I was not in a financial position to take the office space any longer due to unexpected additional expenses."

Respondent submitted a letter from Peerless Insurance dated March 18, 2010. It referred to a claim number 003969980 made by Casale Tile Inc and Ben Chris Realty Corp. of 1736 Richmond Ave., Staten Island. The claim was for property damage with a date of loss of March 13, 2010.

Photos were taken and presented at the hearing. The photos were of alleged damaged poles on Respondent's roof. The poles were to have held the sign in question in place.

Ms. Debra Digregorio, the office manager of Casale Tile testified at the hearing. Part of Ms. Digregorio's testimony was a repetition of what was presented in the two notarized letters. She stated that the gentleman from Clean Sweep wished to rent space in their building for his business. He was the person who installed the advertising sign on the roof. A windstorm in March knocked the sign down. Clean Sweep never did rent space in their retail store.

I find the testimony of the witnesses at the hearing and the statements in the two notarized letters credible. I find based on the evidence that since Clean Sweep never rented space in the cited premises, it was not conducting business at 1736 Richmond Ave. on the date the issuing officer observed the advertising sign on the roof. Thus it was not an accessory sign.

Petitioner claimed that Respondent was an OAC by virtue of having an outdoor advertising sign on its property.

Section 26-259 (c) defines 'outdoor advertising business' as the business of selling, leasing, marketing, managing, or otherwise either directly or indirectly making space on signs situated on buildings and premises within the city of NY available to others for advertising purposes....

Section 26-259 (b) defines 'outdoor advertising company' as: a person corporation...or other business entity that as a part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business.

Petitioner's only evidence in this case was the testimony of the issuing agent that on one day, 2/22/10, he observed an outdoor advertising sign. Petitioner was following the inference that was allowed in TRIBECA TOWER, that Respondent permitting an outdoor advertising sign on its property is thus acting as an OAC.

Yet the sections of law defines an OAC, "...that as part of the regular conduct of its business engages in...." I find in this case that Respondent's intent in allowing the sign on its roof was conditioned on Clean Sweep renting space in their store for the sign's business. The sign was up for thirty days or less. When the sign was damaged by a windstorm and the owner of Clean Sweep decided it could not afford to rent space, the sign was not re-erected. There was no evidence that any other advertising sign was put up prior to or after the Clean Sweep sign.

I find based on the facts that Respondent did not engage in the business of an outdoor advertising company as part of its regular conduct of its business. Thus Respondent did not fall under the definition of an OAC. In concluding that Respondent is not an OAC, citing Respondent for a class one violation is incorrect. The classification is an element of the prima facie case and thus if the classification is incorrect, Petitioner failed to present proof of an essential element of its prima facie case of the notices of violation. All five notices of violation cite Respondent for a class one violation and therefore they are all dismissed.

TOTAL CIVIL PENALTY: \$0.00



Mon Jan 2011 01/10/11 10:33:44

Control 5

01/10/2011

Marc Weiner, Administrative Law Judge

Date

**PAYMENT DUE WITHIN TEN (10) DAYS
READ BACK OF THIS ORDER – PROTECT YOUR RIGHTS**

JAN 10 2011