THE CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD

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

Method of Appearance
Live Hearing

DECISION AND ORDER
Violation #: 034825846L et al. (4 NOVs)
Hearing Date: October 1, 2010

To: ROBERT HOCHMAN ESQ
80 MAIDEN LANE
SUITE 507
NEW YORK, NY 10038

City of New York v. CARL DEFILIPPO

Total Civil Penalty: $0.00

4 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: 034825846L
PLACE OF OCCURRENCE: 1762 65 STREET BROOKLYN
DATE OF OCCURRENCE: 02/23/2010
ISSUING OFFICER/AGENCY: 2220 DOB
ECB CODE: B160
CHARGE: AC 28-105.1
DISPOSITION: DISMISSED — CIVIL PENALTY IMPOSED: $0.00

NOV: 034825847N
PLACE OF OCCURRENCE: 1762 65 STREET BROOKLYN
DATE OF OCCURRENCE: 02/23/2010
ISSUING OFFICER/AGENCY: 2220 DOB
ECB CODE: B165
CHARGE: ZR 32-63
DISPOSITION: DISMISSED — CIVIL PENALTY IMPOSED: $0.00

NOV: 034825848P
PLACE OF OCCURRENCE: 1762 65 STREET BROOKLYN
DATE OF OCCURRENCE: 02/23/2010
ISSUING OFFICER/AGENCY: 2220 DOB
ECB CODE: B169
CHARGE: ZR 32-655
DISPOSITION: DISMISSED — CIVIL PENALTY IMPOSED: $0.00

NOV: 034825849R
PLACE OF OCCURRENCE: 1762 65 STREET BROOKLYN
DATE OF OCCURRENCE: 02/23/2010
ISSUING OFFICER/AGENCY: 2220 DOB
ECB CODE: B162
CHARGE: AC 28-502.6
DISPOSITION: DISMISSED — CIVIL PENALTY IMPOSED: $0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 034825846L AC 28-105.1 NOV: 034825847N ZR 32-63 NOV: 034825848P ZR 32-655 NOV: 034825849R AC 28-502.6

CARL DEFILIPPO

34825848P

34825846L

34825849R

34825847N

Susan Huot appeared on behalf of Petitioner, and Robert Hochman, Esq. appeared on behalf of Respondent, CARL DEFILIPPO, along with witness Carl T. DeFilippo.

Mr. Hochman asked for clarification as to whom the DOB was citing, stating that there are two Carl DeFilippos connected to the cited location, the father and owner of the cited building, Carl D. DeFilippo (Carl D.), and the son and occupant of the basement office, Carl

T. DeFilippo (Carl T.), who is appearing as a witness.

Ms. Huot stated that DOB was proceeding against the building owner, Carl D. DeFiippo, and she then offered into evidence three photos of the alleged violating conditions (Petitioner's Exhibit 1).

On direct examination by Mr. Hochman, Mr. Carl T. DeFilippo testified that 1) His father, Darl D., owns the cited building; 2) His father is retired and is ill; 3) His father has never been in the advertising business; 4) He, himself, has never been in the advertising business; 5) He (Carl T.) is a special agent with the Department of Homeland Security as well as a real estate agent with RE/MAX; 6) He has an office in the basement of his father's building, which he uses as a satellite office for his real estate business; 7) He has clients come there once or twice a week; 8) He advertises on Craig's List and gets calls, and people come to the office; and 9) He had the cited sign put up to direct people to his business in the cited building.

Mr. Hochman offered into evidence a deed showing that his parents own the cited building (Respondent's Exhibit A), a letter from Hugo Salazar of RE/MAX at The Slope office, stating that Carl T. is a licensed agent for RE/MAX and can work at other locations for them (Respondent's Exhibit B). He argued that the sign is used to direct people to Carl T.'s office in the cited building, and the cell phone number on the sign is that of Carl T.'s personal cell phone, which he uses for business.

Mr. Hochman then offered into evidence five photos of the basement, which Carl T. identified as his office door marked "Office," his desk with a laptop and other office equipment and materials on it, a RE/MAX poster behind the desk, an end table with RE/MAX pamphlets on it and multiple sets of keys with tags on them on hooks on the wall (Respondent's Exhibit C).

Carl T. further testified that the cited sign was up for three or four months before the date of issuance of the instant NOVs, and he had it taken down at a cost of $700 on 4/27/10, the same day his father received notice of the instant NOVs (see Respondent's Exhibit D – bill for sign removal). He stated that he did not solicit RE/MAX to put up the sign, he was not paid to put up the sign, he paid for the sign to be created and hung, he does not pay rent to his father, and his father was not paid to put up the sign.

On cross-examination by Ms. Huot, Carl T. testified that the photos offered by Respondent show a wide hallway with bookshelves and an end table, and this is a hallway that he and his clients walk through to get to his office. It is not a common area and is not used by anyone else in the building.

Ms. Huot then offered into evidence a Certificate of Occupancy of the cited building (Petitioner's Exhibit 2). She argued that it allows for no occupancy in the basement.

Mr. Hochman stated that the C of O allows for accessory occupancy in the cellar, and Carl T. described the area as having windows and five steps down from the sidewalk level.

In closing, Mr. Hochman motioned to dismiss the NOVs, arguing that 1) Respondent is not an outdoor advertising company; 2) This is just a father who permitted his son to use space in his building to open a real estate office; 3) The cited sign is an accessory sign and not an advertising sign, and it directs attention to a business at the premises where the sign was hanging (to the office via Carl T.'s cell phone number; 4) An advertising sign directs people to something not on the premises; 5) Carl T. is at the office, which is a satellite office, on the premises three days a week, he keeps keys for various properties there, and even if the business is not there legally, that is not the issue in this case, and that would not convert the sign to an advertising sign; 6) The amount of time that the sign was up doesn't make Carl D. (the father) an outdoor advertising company, and Carl D. did not allow his son to use the space for profit, but rather, it was an act of love; 7) Regarding NOV #34825848P, the section refers to permitted (as in allowable) signs, and this is a permitted accessory sign, and as such, Respondent is subject to lower penalties; and 8) If his motions are denied, Respondent seeks mitigation.

In closing, Ms. Huot argued that 1) The cited sign does not fit the definition of an accessory sign found in the zoning resolution; 2) To qualify as such, a sign must draw attention to a legally permitted use on the zoning lot; 3) The cited sign directed people to RE/MAX at the Slope; and 4) Carl D. (the father) is an outdoor advertising company despite the fact that there is no leasing agreement.

The record was held open for post-hearing submissions until November 9, 2010.

The two pertinent issues in the instant case are 1) Was Respondent acting as an outdoor advertising company?; and 2) Was the cited sign a legal accessory sign?

Issue 1)

Section 28-502.1 reads in relevant part:

OUTDOOR ADVERTISING COMPANY. A person, corporation, partnership or other business entitity 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.

OUTDOOR ADVERTISING BUSINESS. 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 New York available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered on the same or a different zoning lot and whether such sign is classified as an advertising sign pursuant to section 12-10 of the zoning resolution.

Regarding the issue of whether or not Respondent is to be considered an outdoor advertising company, recent decisions by the Board of Appeals have clearly indicated that when a property owner leases space to others for the purpose of placing a sign or signs for advertising on the outside of its building, that property owner becomes an outdoor advertising company (see NYC v. Tribeca Tower, Inc., Appeal No.46583 (2009); NYC v. 126 Chambers Street Corp., Appeal No. 0900072 (2009); and NYC v. Stacy Maou, Appeal No. 900123 (2009)).

In the instant case, Respondent was not shown to have engaged in any conduct that can be construed as holding himself out as engaging in the outdoor advertising business.

I FIND that Respondent was not acting as an outdoor advertising company and was not required to obtain an OAC registration number.

Therefore, NOV #34825849R is DISMISSED.

Issue 2)

In their post-hearing submissions, both sides reference the definition found in ZR Section 12-10, which reads in relevant part:

Accessory use, or accessory (10/13/10)

An "accessory use":

(a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, #accessory# docks, off-street parking or off-street loading need not be located on the same #zoning lot#; and

(b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and

(c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners,occupants, employees, customers, or visitors of the principal #use#.

When "accessory" is used in the text, it shall have the same meaning as #accessory use#.

An #accessory use# includes:

(15) #Accessory signs#.

I FIND that the cited sign directed prospective customers to Carl T. DeFilippo's real estate business/office at the cited location by the only contact information given on the sign, Mr. DeFilippo's private cell phone number. As such, I find that the cited sign was used for the same purpose as "the principle use to which it is related," Mr. DeFilippo's real estate office, which is on the same zoning lot as the sign.

Ms. Huot argues that the use must be a legal use. I FIND that that is a separate issue relating to occupancy and it is not pertinent herein.

As such, I FIND that the cited sign was an allowable accessory sign and not an outdoor advertising sign.

Therefore, NOV #s 34825846L, 34825847N and 34825848P are DISMISSED.

TOTAL CIVIL PENALTY: $0.00	
Mon Nov 2010 11/15/10 11:08:04 Control 5 NOV 16 2010	11/15/2010
Susan Brand, Administrative Law Judge	Date

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