

website



**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 #: 034844937K (1 NOV)
Hearing Date: June 2, 2011

To: Cohen Hochman & Allen
80 Maiden Lane, Suite 506
New York, NY 10038

City of New York v. BASONAS
CONSTRUCTION CORP

Total Civil Penalty: \$0.00

1 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: 034844937K
PLACE OF OCCURRENCE: 157 EAST 72 STREET MANHATTAN
DATE OF OCCURRENCE: 12/20/2010
ISSUING OFFICER/AGENCY: 2365 DOB
ECB CODE: B109
CHARGE: BC 3301.2 AC 27 1009A
DISPOSITION: DISMISSED

CIVIL PENALTY IMPOSED: \$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 034844937K BC 3301.2 AC 27 1009A

Respondent, Basonas Construction Corp., was charged with an Aggravated II condition alleging failure to safeguard persons and property at its jobsite after the rear windshield of the issuing officer's vehicle was shattered, apparently by a falling object.

Summary of the Testimony

The issuing officer, DOB Inspector Whint, was first questioned by DOB attorney Michael Burns. The inspector testified that he visited the site as part of a regular inspection, and he observed façade work ongoing at the time. He accompanied the site safety manager during a review of the sidewalk shed, roof, and scaffold. At the conclusion of his review, the inspector testified, he returned to his Department-issued vehicle, which had been parked on the street adjacent to the sidewalk shed, and saw the rear windshield shattered. The inspector observed a nail on the street, which resembled nails he saw on the shed platform. He then informed the site safety manager, and his supervisor John Korkorian, who came to the scene shortly thereafter. After a few hours, the inspector issued the notice of violation, which he served by use of affix and mail service under the City Charter after first asking the site safety manager if anyone was present who could accept service on behalf of Respondent. The affidavit of service indicates the original NOV was posted at 3:50 p.m.

Inspector Whint provided a series of photographs of his vehicle, which were collectively marked as Petitioner's Exhibit 1(a)-1(d). Three photographs show an impact point near the top of the windshield, and two also show a sizable hole in the glass. The fourth photograph, which the inspector testified he took last, he identified as the shed platform and shows two nails and a cinder block. The inspector could not recall at what point in the day he took the photographs. He testified in response to my question that the shed platform was ten to twelve feet above street level.

Respondent's attorney Robert Hochman moved to strike Petitioner's #1(a), 1(c), and 1(d) as prejudicial. The motion is denied. The inspector acknowledged when I questioned him that the hole in the glass was not caused by the impact, but rather when he repeatedly opened and closed the side doors to retrieve paperwork. This was confirmed by Respondent's witnesses, whose testimony is discussed below, and Respondent does not dispute that the photograph is of its sidewalk shed platform, and its own evidence shows the same impact point on the windshield. I do not find that there is a dispute among the parties as to the actual damage caused by the initial impact.

On cross-examination by Mr. Hochman, Inspector Whint reiterated that he collected the nail that he observed on the street, but may not have taken a photograph of it. The inspector indicated that he still possessed the nail and could retrieve it, which Mr. Hochman agreed to, but I declined to recess the hearing for the inspector to return to his office or car. The inspector testified that he did recall observing Respondent's witnesses, Eugene Kastner, John Lonergan and George Lorenzo, but that he did not see Mr. Lonergan until after he posted the NOV on the sidewalk shed. He was unaware if the vehicle had been in a prior accident. He testified that he did not see or

hear the impact.

Mr. Kastner, the property manager for the building, testified that he had been in his office when he was notified that there was an incident with the inspector's car. He came outside, observed the vehicle parked in a no standing zone, and testified that he looked around the block for an item that could have caused the damage. Mr. Kastner testified he took a series of photographs of the inspector's car, two of which were marked as Respondent's Exhibits A and B. Respondent's A shows the windshield shattered but without a hole. The impact point is also visible. Respondent's B shows a nail next to a quarter, which Mr. Kastner testified he placed for scale; the inspector acknowledged this appeared to be the nail he found on the street.

Mr. Kastner disputed much of Inspector Whint's testimony, including the length of time Inspector Korkorian took to arrive at the scene, and testified that Inspector Whint gave conflicting reasons for his presence at the building, and told Mr. Kastner that he had been in accident in the same vehicle two months earlier. On cross-examination after a recess, Mr. Kastner admitted he did not see the inspector go up onto the sidewalk shed or the roof. He conceded that the rear windshield was shattered, and saw the inspector open and close the car door a few times, after which the hole appeared.

Mr. Loneragan then testified that he is a construction supervisor for Respondent, and authorized to accept service on its behalf. He was and is responsible for overseeing a number of jobs, which included the work at the subject premises. Mr. Loneragan testified he was called to the jobsite after the incident, and though did not speak with Inspector Whint, he spoke with Inspector Korkorian. According to Mr. Loneragan, the only work scheduled for that day was pointing, i.e., installing mortar into joints that are already cut on the façade. The only nails used at the premises were for securing equipment under a tarp on the sidewalk shed at the end of the day. There would be no reason for any nails to be on the scaffold or the roof of the building. Mr. Loneragan testified that the nails at the jobsite, including the one found by Inspector Whint, weigh less than an ounce each, and one would not have caused the windshield to shatter if it fell from the top of the sidewalk shed.

On cross-examination, Mr. Loneragan testified he arrived at the premises around 4:00 p.m. He acknowledged that a nail falling from the roof or scaffold when it was positioned on the tenth floor could well have caused the damage to the inspector's car. He could not recall if workers were on the scaffold at the time he arrived. Mr. Loneragan responded to my question that at the end of each day the scaffold was stored on top of the shed, not on the roof.

Mr. Lorenzo was the last of Respondent's witnesses. He testified that he was the job foreman, and present onsite on the date of occurrence. Mr. Lorenzo testified that Inspector Whint conducted a review of the premises, including the roof and the scaffold.

After the inspector discovered the damage to his vehicle, he ordered the scaffold to be brought down and inspected it and the sidewalk shed. After some time, Mr. Lorenzo testified he saw the inspector bend down and pick up a nail from the street, approximately twenty feet from the car. He confirmed on cross that he witnessed the inspector pick up the nail.

Respondent's Motion to Dismiss

Mr. Hochman initially moved to dismiss the NOV for lack of proper service. As the NOV was served using "affix and mail" pursuant to section 1049-a(d)(2) of the City Charter, before posting the original NOV at a conspicuous location at the place of occurrence, the issuing officer must first make a reasonable effort to personally serve the named respondent, or in the case of a corporate respondent like Basonas Construction, an officer, member, or designated agent.

Because Mr. Loneragan was present at the same time as Inspector Whint and was authorized to accept service on behalf of Respondent, Mr. Hochman argued, the inspector should have delivered the original NOV to Mr. Loneragan. Mr. Burns responded that Mr. Loneragan acknowledged he did not speak Inspector Whint, and Mr. Loneragan may well have arrived after the NOV was actually posted but before the inspector left. Mr. Burns further noted that Inspector Whint testified he spoke with the site safety manager, who told him no one was present to accept service at the time.

I find, based on the testimony of both parties' witnesses, that Petitioner properly served the NOV on Respondent pursuant to the City Charter. The inspector's un rebutted testimony that he spoke with the site safety manager establishes a reasonable effort was made to serve a responsible person before the NOV was posted. Mr. Hochman provided a copy of a report by the site safety manager; I give this document limited weight in light of the absence of the manager to be cross-examined, but note it does not address service. The inspector was not obligated to consult with everyone on site to determine if a responsible person was present. I find he reasonably relied on the representation of the site safety manager. I find that Respondent has not rebutted this evidence. Even if Mr. Loneragan told the supervising inspector he could accept service of a notice of violation, there has been no evidence that this was relayed to Inspector Whint prior to the posting of the violation. Mr. Hochman did not argue that the sidewalk shed was not a conspicuous location, or that the required mailing was not performed.

Existence of a Violating Condition

Mr. Hochman further argued that Respondent had adequately protected persons and property at the jobsite, and was not responsible for the incident that resulted in to the damage to the inspector's car. He noted that notice of violation states that "a piece of debris or a nail" caused the damage, and thus argued that the inspector could not state with certainty what struck the rear windshield. Mr. Hochman argued that the NOV was speculative and the inspector had embellished the claim by taking photographs after further damage which he acknowledged causing, and relied on the testimony of Messrs. Kastner and Lorenzo that the nail was not observed for some time after the incident. He further argued that an Aggravated II penalty would be improper were the violation sustained, as

Respondent had taken steps to protect the public by the presence of the sidewalk shed.

Mr. Burns argued the NOV should be sustained, and the Aggravated II penalty imposed. He noted that Mr. Lorenzo testified he accompanied the inspector for much of the time the inspector was present, and actually witnessed the inspector pick up the nail. The language in the NOV could be attributed to the inspector being unsure at the time he wrote the violation what happened. Mr. Burns also argued that Mr. Lorenzo's testimony contradicted Mr. Kastner's in some respects, and explained discrepancies in others. As Mr. Burns noted, tort law is not applicable here, and in any event, the inspector was permitted to park in a no standing zone during his inspection.

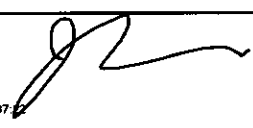

After considering the arguments, testimony and evidence of both parties, I find that Petitioner has not established a prima facie violation. I do not credit much of Mr. Kastner's testimony, given his contention that the inspector did not claim to be conducting a regular inspection of the site is contradicted by the testimony of Mr. Lorenzo, who actually accompanied Inspector Whint for the majority of the time. There is considerable animosity between Inspector Whint and Mr. Kastner that manifested itself during the hearing, but I find the testimony of the witnesses and the issuing officer was generally consistent regarding the key details of the initial damage to the vehicle, and where the nail was discovered.

I find nothing nefarious about the inspector's discovery of a one-inch nail on a busy street. Even if none of Respondent's witnesses saw the nail, this can be attributed to the fact that it is small object. Moreover, Mr. Lorenzo testified he saw the inspector pick up the nail.

However, by the inspector's testimony, he acknowledged that the only other place he observed any other nails after a thorough review of the entire job site was on the sidewalk shed platform. I do not find it likely, and neither party argues, that a 1-ounce nail falling ten feet would have caused the windshield to shatter. Mr. Lonergan admitted he could not say that no nails were on the scaffold, but it is Petitioner's burden in the first instance to show that Respondent acted improperly, and allegations in the NOV and the issuing officer's testimony have not met this burden. I am not persuaded by Mr. Burns' argument that the inspector's reference to other debris possibly causing the impact was simply the inspector's initial impression. The allegations plainly read as a narrative at the conclusion of his investigation; the last sentence states he took pictures as evidence.

Whatever struck the inspector's car and caused the initial damage, Petitioner has not sufficiently demonstrated on the record before me that it was the result of an act or omission by the Respondent.

The notice of violation accordingly is dismissed.

TOTAL CIVIL PENALTY: \$0.00	
 <small>Fri Jun 2011 08/03/11 12:37</small>	 JUN 08 2011 <small>06/03/2011</small>
James Moore, Administrative Law Judge	Date

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