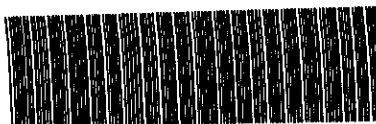




THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD

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 #: 034872955M et al. (5 NOVs) Hearing Date: May 12, 2011

City of New York v. 149 LUDLOW TENANTS INC

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

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: 034872955M PLACE OF OCCURRENCE: 149 LUDLOW STREET MANHATTAN DATE OF OCCURRENCE: 11/09/2010 ISSUING OFFICER/AGENCY: 2461 DOB ECB CODE: B130 CHARGE: BC 3314.2&AC27-1042 DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034872956Y PLACE OF OCCURRENCE: 149 LUDLOW STREET MANHATTAN DATE OF OCCURRENCE: 11/09/2010 ISSUING OFFICER/AGENCY: 2461 DOB ECB CODE: B223 CHARGE: BC 3307.6&AC27-1021 DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034872957X PLACE OF OCCURRENCE: 149 LUDLOW STREET MANHATTAN DATE OF OCCURRENCE: 11/09/2010 ISSUING OFFICER/AGENCY: 2461 DOB ECB CODE: B109 CHARGE: BC 3301.2 AC 27 1009A DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034872958H PLACE OF OCCURRENCE: 149 LUDLOW STREET MANHATTAN DATE OF OCCURRENCE: 11/09/2010 ISSUING OFFICER/AGENCY: 2461 DOB ECB CODE: B263 CHARGE: AC 28-204.4 DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

NOV: 034872959J PLACE OF OCCURRENCE: 149 LUDLOW STREET MANHATTAN DATE OF OCCURRENCE: 11/09/2010 ISSUING OFFICER/AGENCY: 2461 DOB ECB CODE: B263 CHARGE: AC 28-204.4 DISPOSITION: DISMISSED CIVIL PENALTY IMPOSED: \$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 034872955M BC 3314.2&AC27-1042 NOV: 034872956Y BC 3307.6&AC27-1021 NOV: 034872957X BC 3301.2 AC 27 1009A NOV: 034872958H AC 28-204.4 NOV: 034872959J AC 28-204.4

Kelly Kamen appeared on behalf of Petitioner, and Robert Hochman, Esq. appeared on behalf of Respondent, To the Owner of, along with witness Coleen Fitzgibbon.

Mr. Kamen stated that Petitioner stands on the cases presented in the NOVs, except for NOV # 34872957X, which is only properly

issued to contractors, and since Respondent is an owner and not a contractor, Petitioner makes no recommendation for NOV #

Mr. Hochman argued that service was improper for all five NOVs. He argued that Respondent is the owner of the cited premises (see Respondent's Exhibit A - ACRIS printout), and Respondent had a contract dated April 1, 2010 with Hoque Construction (see Respondent's Exhibit B - contract), which included the cited scaffolding. On 11/11/10, Respondent, through its attorney, terminated said contract due to a material breach, which included erection of scaffolding without a permit, failing to perform a substantial part of the contracted work, and Respondent's receipt of multiple NOVs (see Respondent's Exhibit C - letter). Hoque contacted Mr. Hochman's office initially, but quickly disappeared and cannot be found.

Ms. Fitzgibbons testified that 1) She is a member of the board of the cited premises; 2) She's had a unit in the building since 1979, which now functions as her office; 3) She occupies unit 2F in the front of the second floor; 4) From the vantage point of her unit, she is able to hear everything from the street below; 5) She was at her unit on the date of issuance of the instant NOV, having arrived at 2PM for a phone meeting; 6) If the inspector had knocked on the door to the residential part of the building, she would have heard the knocking, and if he had gone to the commercial door of the storefront below, he would have been directed to the residential door; 7) She left the premises around 6PM that day and does not recall seeing anything affixed to the door.

On cross-examination by Mr. Kamen, Ms. Fitzgibbons testified that there is no management office or notice directing someone to management in the building, she did not see the issuing officer that day, and she did not know that anything was wrong, as she did not see any summonses.

Mr. Kamen offered into evidence six photos of the alleged violating conditions (Petitioner's Exhibits 1-6).

For all five NOVs, Mr. Hochman renewed his motion to dismiss the NOVs, arguing that charter service requires that reasonable efforts be made to effectuate service upon Respondent prior to posting NOVs, and here, the issuing officer did not indicate what efforts he made on his affidavit of service. He further argued that once the affidavit is rebutted, Petitioner must come forward with corroboration, which has not been done here.

For NOV 34872957X, Mr. Hochman argued that the cited section of law is applicable to contractors and not owner, so he made a motion to dismiss that NOV on these grounds as well.

Regarding Mr. Hochman's service argument, Mr. Kamen argued that just because someone argues that attempt to effectuate service wasn't made does not mean that a rebuttal has been made. Despite that fact that Ms. Fitzgibbons was present in the building, there was nothing to indicate to the inspector that she or anyone else in the building would be a proper person to serve. Since the issuing officer is no longer with DOB, we cannot ascertain whether or not he went to the storefront, and he wrote "No one to serve" in his affidavit under penalty of perjury, leading to the conclusion that he made a reasonable attempt. It's not reasonable to expect the issuing officer to go knocking on doors when there is no indication that any occupant of the building would be in control or part of the ownership.

Mr. Hochman argued that the Board has held that inquiry must be made, and there is no statement from the issuing officer as to what effort he made. Here, where the owner is named as Respondent, it behooved the issuing officer to go into the building or enquire in the storefront below. Ms. Fitzgibbons has a detailed memory of the day, and that did not happen.

Mr. Kamen argued that requiring an issuing officer to knock on a door would be a dangerous standard to adhere to.


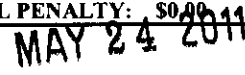
Mr. Kamen also made a motion to amend the charges in NOV 34872958H and NOV 34872959J to 28-204 instead of 28-404, which was mistakenly written.

Mr. Hochman stated that Respondent was victimized by a contractor, who abandoned the site.

Mr. Kamen offered nothing further.

I credit Mr. Hochman's argument and Ms. Fitzgibbons's testimony and find that Respondent credibly rebutted the issuing officer's affidavit of service, and Petitioner has not presented any corroborating evidence or argument to show that the issuing officer made reasonable efforts to effectuate service prior to posting.

Therefore, service for all five NOVs is not proper, and all five NOVs are DISMISSED.

TOTAL CIVIL PENALTY: \$0.00	
	
Fri May 20 11 05/13/11 16:36:11	05/13/2011

Susan Brand, Administrative Law Judge

Date

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