



THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD

Location: 66 John Street, 10th Floor, New York, NY 10038 (212)361-1400

Method of Appearance: AT HEARING

Violation Number: 041361233J

Mailout: S-PT/T

City of New York vs.: BERKOWITZ BABY CARRIAGES & CRIBS

Place of Occurrence: 1249 CONEY ISLAND AVENUE

Issuing Officer: THOMAS

Borough: BROOKLYN

Agency: DOS - ENFORCEMENT AGENTS

Disposition: DISMISSED

Master: 179 NOTICES

Hearing Date: 3/12/2010

TO COHEN HOCHMAN & ALLEN
OTIS ALLEN, ESQ.
80 MAIDEN LANE APT./NO.: SUITE 506/507
NEW YORK, NY 10028

A Notice of Violation was duly served, charging that on: 4/16/2008, at 04:10 PM, the Respondent violated the below infraction(s).

The Respondent appeared and entered the plea(s) indicated below, and a hearing was held before me on the above-cited date.

On the Record before me, I find: DISMISSAL: For the reasons stated below, the Notice of Violation is dismissed.

Table with 5 columns: Infra. Code, Section/Description, Plea, Disposition, Reason, Penalty. Row 1: AS30, 10.119, ILLEGAL POSTING OF HANDBILL/NOTICE 179 notices, Deny, Dismissed, 1, \$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

Ellen Cooper, Esq. represented the Petitioner. Sgt Hernandez was also present. Otis Allen, Esq. represented the Respondent, Berkowitz Babies. Sarah Balcamo, ECB intern was observing. The issuing officer, SEA Victor Thomas was absent due to illness.

Sgt. Hernandez testified to the sighting, logging and removal of posters by the issuing officer, a photocopy of which was submitted into evidence as Petitioner's Exhibit "1". It advertised "Yeshiva Shavei Hevron Presents Uncle Moishey Chai Hamod Concert". On the bottom of the poster there are six graphics under the word "Sponsors" One of the graphics contains the name Berkowitz Baby Carriages and Cribs, along with an address and a telephone number (718-436-3333). Sgt. Hernandez verified the Respondent's name and address through web searches on Lexis/Nexis (Petitioner's Exhibit "2") and AnyWho.com, (Petitioner's Exhibit "3"). The original service of the notices of violation was by certified mail, but it was returned as unclaimed. Service was then made by Sgt Hernandez personally upon one Susan Weiss at Berkowitz at the stated address on New Utrecht Avenue. His affidavit of service was submitted, (Petitioner's Exhibit "4"). It was not filed with ECB, according to the witness.

Respondent submits two letters in defense on the merits. The first letter, (Respondent's Exhibit "A") is from Sarah Berkowitz, presumably on the Respondent's letterhead. While her position in the business is not stated, the letter indicates that the Respondent had nothing to do with the event and it was mistakenly listed as a sponsor. The second letter, (Respondent's Exhibit "B") was from Moshe Stern of Yeshiva Shavei Hevron and confirms that there was a mix-up and the Respondent was mistakenly listed as a sponsor.

Respondent challenged service on the grounds that the affidavit of service reflecting the personal service was never filed. Petitioner contends that service was complete with the certified mailing and personal service was merely a courtesy.

Personal service of the notices of violation was required. New York City Charter 1404 (d)(2)(b)(iv) provided: "service of a notice of violation of any of the provisions of section 10-119 or 10-120 of the administrative code of the city of New York and over which the environmental control board has jurisdiction, may be made by certified mail, return receipt requested, to the respondent's last known residence or business address, provided that delivery of such notice shall be restricted to the respondent. Service by certified mail shall be deemed complete upon mailing of the notice of violation unless the notice of violation is returned to the sender by the United States postal service for any reason other than refusal of delivery." As the notices were returned unclaimed, not refused, this service was ineffective. This section has been renumbered as part of the reorganization of ECB into OATH, but the rule remains the same.

The Petitioner's failure to file the affidavit of service did not deprive ECB of jurisdiction in this matter. 15 RCNY §31-31 (d) (subsequently recodified). Respondent's motion to dismiss based in improper service is therefore denied.

Regarding the merits, I find the credible evidence demonstrated that the Respondent had no control over the posting of these handbills. It even denied that it was a sponsor. The letter from the organizer of the event further acknowledged its mistake in placing the Respondent's name on the poster. I therefore find that the Respondent has credibly rebutted the presumption of responsibility created under New York City Administrative Code §10-119(b).

The notices of violation are dismissed.

CIVIL PENALTY: I order the Respondent to pay a total of: \$0.00

In addition, I order the Respondent to perform the Compliance Order(s), if any, listed above.

Signature of Administrative Law Judge

Date

ALJ #: 810 ALJ Name TOLCISS, NEIL A.