To Be Argued By:
LINDSAY GARROWAY
Time Requested: 30 Minutes

APL-2018-00164
New York County Clerk's Index Nos. 101770/15, 100303/16,
101768/15, 101769/15, 101767/15

Court of Appeals

STATE OF NEW YORK

Index No. 101770/15

In the Matter of the Application of

FRANKLIN STREET REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

(*Caption continued on inside cover*)

BRIEF FOR PETITIONERS-APPELLANTS

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January 4, 2019

Index Nos. 100303/16 and 101768/15

In the Matter of the Application of

J.P. & ASSOCIATES PROPERTIES CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101769/15

In the Matter of the Application of

41-03 31 AVENUE REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101767/15

In the Matter of the Application of

23-06 JACKSON AVENUE REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

CORPORATE DISCLOSURE STATEMENT

PURSUANT TO 22 NYCRR §§ 500.1(f), APPELLANTS FRANKLIN STREET REALTY CORP., J.P. & ASSOCIATES PROPERTIES CORP., 41-03 AVE REALTY CORP., AND 23-06 JACKSON AVENUE REALTY CORP. ARE AFFILIATES, BUT HAVE NO PARENTS OR SUBSIDIARIES.

STATEMENT PURSUANT TO RULE 500.13(a)

Upon information and belief, as of the date of the completion of this Brief, there is no related litigation pending before any court.

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QUESTION PRESENTED

Does an attorney, who holds title to his own building in a corporate name, violate the Administrative Code of the City of New York by promoting his own law practice on a sign on such building as an "Outdoor Advertising Company" ("OAC")?

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under CPLR 5601(a). The Appellate Division, First Department, issued its Decision and Order on the appeal on July 19, 2018, wherein two justices dissent from the majority opinion on a question of law: namely, whether the ECB Appeals Board's Decisions finding that Petitioners engaged in unauthorized outdoor advertising were arbitrary and capricious, without a rational basis. A14-A49. On August 28, 2018, Petitioners filed a Notice to Appeal to the Court of Appeals of the State of New York pursuant to CPLR 5601(a). A4-A13.

NATURE OF THE CASE

Petitioners appeal the irrational and arbitrary determinations of the Respondents that characterize a lawyer who merely put up signs to promote his small law office as an "Outdoor Advertising Company" and accordingly fine him $380,000.00. Petitioners' signs, which state his name, "John J. Ciafone, Esq." with a prominent headshot, were posted on buildings he owns throughout New York

City. Respondents attempt to reap the benefit at Petitioners expense by refusing to recognize their own precedent, which lays out a logical exception to the broad definition of an OAC for a building owner who hangs signs promoting his own companies. Respondents' arbitrary and capricious determinations attempt to distinguish Petitioners' case based on obvious misunderstandings of facts and law as to corporate form and professional liability. As recognized in the passionate dissenting opinion authored by Justice Andrias and joined by Justice Kapnick in the Appellate Division, First Department, "this disparate treatment…is so unrelated to the achievement of the legitimate purposes underlying the outdoor advertising laws as to be irrational, and is, therefore, arbitrary and capricious," and must be overturned. A35.

This case arises from notices of violation issued by respondent Department of Buildings for violations of New York City Administrative Code ("NYCAC") § 28-105.1, 28-415.1, and 28-502.6, and Zoning Resolution § 32-63, rules governing outdoor advertising signs posted by outdoor advertising companies, for signs posted on Petitioners' buildings advertising the law offices of the principal member of the petitioner corporations. The violations were originally dismissed following administrative hearings, wherein the Hearing Officers correctly held that Petitioners were not outdoor advertising companies under administrative law

precedent *NYC v. Joseph Nativo*, ECB Appeal No. 1000307 (August 19, 2010). A57-61; A83-A85; A90-A94; A100-A103; A112-A116; and *Nativo* at A122-125.

The Appeals Board of NYC Environmental Control Board ("ECB") reversed the determinations of the hearing officers in Decisions and Orders dated May 28, 2015, and October 29, 2015. A62-A66; A86-89; A95-A99; A104-A111; A117-A121. By Notices of Petition and Verified Petitions dated September 25, 2015, Petitioners sought relief pursuant to CPLR 78 to reverse the Appeal Decisions and Orders by ECB as arbitrary and capricious, and contrary to the plain statutory language. Pursuant to CPLR 7803(4), Justice Schlomo Hagler transferred the proceedings from the New York County Supreme Court to the Appellate Division, First Department. A50-A54.

Petitioner appeals from the Decision and Order of the Supreme Court, Appellate Division, First Department, dated July 19, 2018, which affirmed the determinations of ECB with two Justices dissenting. A14-A49. Petitioner requests that the Appellate Division majority be overturned. The determinations of ECB are arbitrary and capricious, without a rational basis, as recognized in the dissenting opinion.

As asserted by Justice Andrias in his dissenting Opinion, the ECB determination that the *Nativo* defense does not apply in this case is void of a rational basis, and arbitrarily applies a distinction not supported by the statutory

scheme. A35. Petitioners were not acting as "Outdoor Advertising Companies," as defined under the New York City Administrative Code § 26-259(b) and (c) as well as within § 12-10 of the New York City Zoning Resolution. Petitioners did not make space on its buildings "available to others for advertising purposes" as defined under New York City Administrative Code § 28-502. Petitioners' signs that simply promoted the law firm of Petitioners' principal do not constitute an "advertising sign" and therefore cannot be charged in Notices of Violation as such.

The Appellate Division majority opinion repeats the error of the lower courts, incorrectly interpreting and applying the definition of "Outdoor Advertising Company" and "Outdoor Advertising Business." Justice Andrias in his dissent recognizes the contradictory assertions of the majority, which claim wherever the owner of the sign and the company advertised are separate legal entities, the sign is made available "to others." A42. This arbitrarily ignores the exception established under *Nativo* without basis in public policy or precedent. Petitioner established that the owner and principal of the cited ownership corporations displayed the signage for his own benefit as an attorney with a solo practice operating at each building. Therefore, Petitioners did not make space on its buildings available "to others," only to himself, and the exception carved out under *Nativo* is satisfied.

Additionally, Respondents' enforcement of Title 28 of the Administrative Code of the City of New York Article 502, including Sections 28-502.1, 28-502.2,

and 28-502.6, and Title 1 of the Rules of the City of New York Section 49 ("Rule 49") violates Petitioner's First Amendment rights as unconstitutional content based distinction which fails to advance a compelling governmental interest by narrowly tailored means.

Petitioners were improperly charged with displaying an Outdoor Advertising Company sign without a permit and in a prohibited district, without having a licensed sign hanger attach or erect the sign or attach UL classification mark or date of sign erection, and without obtaining an Outdoor Advertising Company registration number. Respondents provide no legal justification for the imposition of an extraordinarily high penalty ($380,000.00) for the display of the signage.

The above warrants a reversal of ECB's arbitrary and capricious Appeals Board Decisions, in order to grant the relief requested in the underlying Article 78 Petitions.

ARGUMENT

POINT I: THE APPELLATE DIVISION IMPROPERLY AFFIRMS AN ARBITRARY AND CAPRICIOUS DETERMINATION BY THE ECB APPEALS BOARD THAT IRRATIONALLY DISTINGUISHES BETWEEN CORPORATE STRUCTURES TO EXTRACT PENALTIES FROM A PROPERTY OWNER THAT IS NOT AN OUTDOOR ADVERTISING COMPANY.

As elucidated by the dissenting justices in the Appellate Division Decision, Respondents arbitrarily found that Petitioners' case does not fall under the defense recognized in the 2010 ECB Board Decision, *NYC v. Joseph Nativo*. A35-A49; *Nativo* at A122-A125. ECB's erroneous determination was directly contrary to the decisions of ALJ Morrick and ALJ Selden, who correctly found that *Nativo* directly applied to the facts in the present case. A60, A85, A93, A102, A115-A116. In *Nativo*, ECB held that "the Board does not interpret making space on signs 'available to others' to encompass the display of signs by a property owner that advertise services of companies solely owned by such property owner." A125. The ECB Board focused on the statutory language finding that the building's owner had not made space available "to others" since his own businesses were being promoted. A125. In *Nativo*, this exception is based on the recognition that the owner is promoting himself, not "others," even if the form of himself promoted is a separate legal entity. A125.

As emphasized in Justice Andrias' dissent, ECB makes an arbitrary and capricious distinction in their tortured attempt to distinguish the instant matter from

the exception laid out in *Nativo*. A40-A42. In both cases, an individual owns the subject property on which signs are posted, and the same individual owns the business advertised on the sign. In both cases, the individual takes the form of a corporation either in owning the building or in holding the business. Petitioners emphatically agree with Justice Andrias' dissenting opinion, in that "it is logically absurd to find that the owner is making an outdoor advertising sign 'available to others' in one instance but not the other." A36. Respondents provide no explanation as to how the corporate form of ownership (of either the subject building or business advertised) by the same individual makes a difference in determining whether "others" are promoted. There are no others to be promoted.

A. PETITIONER DOES NOT MEET THE STATUTORY DEFINITION OF OUTDOOR ADVERTISING COMPANY

The issue raised on appeal was originally identified as whether Petitioner "made space on its building available to others for advertising purposes, within the meaning of Code Section 28-502.6." A65. This definition isolates the essential prong on which this case turns. The buildings are not making space available to others; therefore, Petitioners (as owners of the subject buildings) are not Outdoor Advertising Companies. The only party that benefitted from the signs was Petitioners' principal. As such, Petitioners' promotion of their principal's law practice is exactly aligned with the *Nativo* exception.

Mr. Ciafone is the principal for the ownership entities named as Petitioners and also an attorney with a small law firm practice. A55-A56, A58, A84, A91, A101, A114. The signs installed have merely promoted the legal business of this principal as an individual. In their text, the signs read "John J. Ciafone, Esq." with a prominent picture of Mr. Ciafone. A58, A84, A91, A101, A113. The signs do not list Mr. Ciafone's P.C. entity name. Petitioners therefore have not sold advertising space "to others." Mr. Ciafone is the sole owner of the law firm featured on the sign as well as being the property owner under corporate names. A58, A84, A91, A101, A113. This was not disputed in the hearing, or on appeal. Mr. Ciafone, as a property owner acting through Petitioners, cannot qualify as an OAC because he does not make advertising space available "to others," but only to himself.

Respondents incorrectly interpret and apply the definition of "Outdoor Advertising Company" and "Outdoor Advertising Business." NYCAC §§ 26-259(b) and (c) require that advertising is "part of the regular conduct of its business." Respondents fail to present any evidence as to Petitioner's engagement in the "business of selling, leasing, marketing, managing, or otherwise" making sign space available for "advertising purposes." *See* NYCAC Section 26-259(b) and (c). Instead, the only evidence as to the cited corporation is as an ownership entity for the place of occurrence. ALJ Morrick clearly states, "[i]t is uncontested

that Mr. Ciafone owns the cited building." A58, A91. While Mr. Ciafone may own his law business as a P.C., Respondents improperly focus on the corporate structures rather than the central legal issue.

As Justice Andrias highlights in the dissenting opinion, the Appellate Division majority (and Respondents) rely on an incorrect view that the definition of making space "available to others" is satisfied whenever the owner of the sign and the company advertised are separate and distinct legal entities. A42. *Nativo* carves out a clear contradiction to this interpretation, discussed above.

As asserted by the Justice Andrias, Respondents (and the majority) improperly and irrationally distinguish the instant case from *Nativo* based only on the corporate forms of ownership of the subject buildings and the business promoted on the signs. A41-A42. If Mr. Ciafone chose to hold the buildings in his personal name, the *Nativo* exception would apply. A40-A41. Justice Andrias states, "[t]his disparate treatment between buildings owned by an individual who advertises the services of his or her own corporation, and buildings owned by a corporation that advertises the services of its own principal, is so unrelated to the achievement of the legitimate purposes underlying the outdoor advertising laws as to be irrational, and is, therefore, arbitrary and capricious." A35. Neither the spirit nor letter of the law is upheld by distorting the clear *Nativo* defense established in this case.

Justice Andrias in his dissent also distinguishes the three cases relied on in the ECB determinations, wherein the companies involved are separate and independently controlled entities held by different individuals. A42-A43. *See NYC v. Lodz Development, LLC*, ECB Appeal No. 1400355 (July 31, 2014), *NYC v. Stahl and Stahl, LLC*, Appeal No. 1400137 (April 24, 2014), and *NYC v. 415 89th Street, L.P.*, ECB Appeal No. 1200974 (January 31, 2013). A67-A82. In each case, there were multiple actors in play, unlike the instant matter that revolves around Mr. Ciafone alone. Given that Mr. Ciafone is the sole player here, the case is perfectly aligned with *Nativo*, and the defense is clearly applicable.

B. NYC DEPARTMENT OF BUILDINGS IS PERMITTED TO PIERCE THE CORPORATE VEIL TO HOLD INDIVIDUAL PROPERTY OWNERS LIABLE FOR SIMILAR VIOLATIONS; HOWEVER, PETITIONERS HERE ARE ARBITRARILY PREVENTED FROM DOING THE SAME WHEN SHEDDING THE CORPORATE FORM.

While focusing on the corporate structures of the parties in this matter, Respondents arbitrarily refuse to pierce the corporate veil in order to establish a defense, whereas in other matters, ECB has routinely allowed NYC agencies to pierce the corporate veil with shockingly little evidence to prove individual liability.[1] It appears Respondents apply a legal standard only when it supports a finding of liability.

[1] *See NYC v. Kin Lam*, Appeal No. 1401270, Feb. 26, 2015 (ECB Board held Respondent individually liable when his name appeared on an old internal FDNY record) (Addendum 1); *NYC v. Oleksandr Nad*, Appeal No 1300741, Oct. 31, 2013 (ECB Board held Respondent

Respondents below argue that Mr. Ciafone's corporations defeat his *Nativo* defense, but Mr. Ciafone could easily be issued an ECB violation by Respondent DOB in his personal name. The existing ECB case law upholds the NYC agencies' discretion to cite ANY corporate officer behind a property ownership corporation for any maintenance infraction at the property.

As recognized by Justice Andrias in his dissenting opinion, according to Respondents interpretation, an owner's ability to raise the *Nativo* defense will rise and fall on the arbitrary way he or she chose to structure their corporation. A40-A41. The corporate structures that are set up for any property or business are often a matter of accounting or tax planning rather than a meaningful reflection of who or what controls a piece of property or business. A48. Given the severe monetary fine these NOVs carry, this focus on such an insignificant issue is the very definition of arbitrary and capricious.

Additionally, Respondents' contradictory characterizations of Petitioner's business are self-serving and arbitrary. Incongruously, Respondents argue Mr. Ciafone, through Petitioners, has acted as an OAC by displaying signage in the "regular conduct of its business." NYCAC 26-259(b). However, Respondents conversely argue the same activities do not constitute "rendering professional services," as laid out by BCL § 1505, without citing any statutory or legal case

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individually liable because he was the owner of the company responsible for the cited work, and his name appeared on a permit as the applicant of record) (Addendum 4).

support for this reasoning. A66, A99, A107, A121. This contradiction belies that arbitrary and capricious manner of the ECB decisions.

BCL § 1505 makes the shareholder, employee or agent of a professional service corporation personally and fully liable for any negligent or wrongful act or misconduct conducted while rendering professional services. However, ECB finds that BCL § 1505 does not apply to the acts committed in violation of the NYCAC. This is a completely incorrect and overly broad interpretation of the BCL. With no rationale or legal support cited for this interpretation of the BCL, the Board's finding here is arbitrary and capricious. ECB "notes that the personal liability that BCL Section 1505 confers on a P.C. shareholders, agents, and employees relates solely to liability incurred in the course of professional practice on behalf of the P.C., not to the instant Code and ZR violations." A66, A99, A107, A121.

The signs posted by Mr. Ciafone promote himself and his legal practice. The signs feature his likeness and the types of professional services he offers to further this objective. Advertising and client expansion are part of any business's normal activities. The erection of signage to promote a business is undoubtedly done in "the course of professional practice." The Board makes an error of law in its interpretation of the BCL.

BCL § 1505 does not merely apply to malpractice or professional negligence as Respondents argue. BCL § 1505 may sometimes incur personal liability for

lawyer shareholders for a number of business activities like business debts and torts. *See Infosearch, Inc. v. Horowitz,* 117 Misc. 2d 774 (Civ. Ct. 1982). Under BCL § 1505, a shareholder or agent of a professional service corporation is liable for those torts of the corporation in which he is participant or which are committed by those acting under his direct supervision or control. *See We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 103 A.D.2d 130 (1984). The fact that the lawyer-shareholder is individually liable for the business debts of the professional corporation is further evidence of this point. *Infosearch, Inc.,* 117 Misc.2d at 774.

Applying inherently contradictory standards, Respondents arbitrarily refuse to recognize the personal liability the principal of an ownership corporation could incur for building violations, despite case law to the contrary, and concludes that BCL § 1505 does not apply to NYCAC violations. As succinctly summarized by Justice Andrias, "the fact that [Mr. Ciafone] may have operated his practice as a professional corporation does not form a rational basis to distinguish *Nativo*." A47.

POINT II: THE ECB BOARD'S APPEAL DECISION AND ORDER IS LEGALLY INSUFFICIENT AS IT DOES NOT CONTAIN THE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

By rule, ECB is directed to make a finding on all material issues to the case before it. *See* 48 RCNY 3-57(a). Here, contrary to this standard, the ECB Board Appeal Decision does not contain findings of fact and conclusions of law on ALL issues raised.

Where the grounds relied upon by the government agency are "inadequate or improper," a reviewing court is "powerless to affirm the administrative action by substituting what it considers to be a more adequate or property basis" *Matter of Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 913 quoting *Securities Comm. v. Chenery Corp.*, 332 U.S. 194, 196. An ALJ is required to make findings of fact in each decision, setting forth what the ALJ believes to have actually occurred with respect to each element of the violations charged. This same standard should apply to the ECB Board, which, in this case, failed to state the grounds on which its determinations were made. A62-A66; A86-89; A95-A99; A104-A111; A117-A121.

By failing to even address the issues raised during the hearings, the ECB Board also failed to provide sufficient rational basis for its determination overturning the ALJs' decisions. Similarly, in *Costco Wholesale Corp. v. New York State Liquor Authority*, 125 A.D.3d 775 (2015), the Appellate Division found that SLA acted arbitrarily and capriciously in denying petitioner's liquor license when the bases proffered by SLA for its decision was without factual support in the record. Without any written basis for its decision, Respondents leave courts unable to review its decision for rationality or factual support.

Since here, ECB did not make findings of fact, conclusions of law, or credibility findings regarding the issues discussed above, the Petitioner respectfully requests that the ECB Board's Decisions and Orders be reversed on appeal.

A. RESPONDENTS FAIL TO PROVE THE CLASS 1 DESIGNATION, THEREFORE THE NOVS MUST BE DISMISSED ON APPEAL.

The ECB Board has held that DOB must prove every element of the charge in order to establish a prima facie case. Furthermore, the classification is an element of the charge which must be proved by DOB. *See NYC v. Beit Ohr*, ECB Appeal No. 0900009 (July 14, 2009). 1 RCNY §102-01(b) provides that an "immediately hazardous violation," or Class 1 NOV, must create an "economic disincentive" to advertising companies that would continue to violate the law.

Respondent DOB must sufficiently demonstrate how Respondent is acting as an OAC in order to prove its case on Class. As discussed above, Respondents have failed to prove that Petitioners were acting as OACs, therefore all Class 1 violations must be dismissed.

B. PETITIONER PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THE SIGNS AS "ACCESSORY SIGNS" BECAUSE MR. CIAFONE CONDUCTS ACTIVITIES PERTAINING TO HIS LAW BUSINESS INSIDE THE PLACES OF OCCURRENCE

ECB failed to make a finding on several issues that were argued exhaustively at the hearing and on appeal, including whether or not the sign constituted an "accessory" sign. A62-A66; A86-89; A95-A99; A104-A111; A117-

A121. In general, ECB shows a clear bias against Mr. Ciafone and in favor of DOB.

The ALJs incorrectly conclude that Petitioners' signage cannot be an "accessory use" because it falls short of the second prong of the ZR 12-10 definition ("is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#"). A59, A85, A92, A101-A102, A114-A115. However, its actual use is also as "professional offices," a use allowed by statute. *See* ZR § 12-10. Attorneys and other professionals are legally permitted to have home offices under the ZR as "a home occupation" as long as the use "is clearly incidental to or secondary to the residential use of a dwelling use of a dwelling unit" and that it "occupies not more than 25% of the total floor area of such dwelling unit . . . and in no event more than 500 square feet of floor area." ZR § 12-10.

Zoning Resolution § 12-10 does not mandate that an "accessory" sign state that the advertiser's business is operated inside the building. This is an incorrect and overly-narrow interpretation of "accessory use" applied by ECB. The DOB failed to present any evidence concerning the business activities observed inside the place of occurrence. It is not clear whether DOB even directed its officer to investigate or even attempt to enter the places of occurrence to find out this critical information. Respondent DOB's case is based almost entirely on supposition and

conjecture. Give the lack of contrary evidence presented by Respondent DOB, the ECB decisions to reverse the ALJs' findings were arbitrary and capricious.

C. RESPONDENTS' IMPOSITION OF THIS ASTRONOMICAL FINE IN LIGHT OF THE FACTS IS AN ABUSE OF DISCRETION.

While it is true that administrative agencies enjoy broad discretionary power in making their determinations, CPLR § 7803 dictates that an agency's "abuse of discretion as to the measure or mode of penalty or disciple imposed" qualifies for review by higher courts.

Here, ECB and DOB fail to justify the imposition of extraordinarily high penalties totaling $380,000.00 when the sole issue on appeal (according to Respondents) is the corporate structure of Mr. Ciafone's businesses. A38. There is no allegation of any danger posed to the public health or safety, and no economic disincentive is created when Mr. Ciafone never received rent from a third party for the display of advertising signage. *See* 1 RCNY § 102-01(b); A45-A46. The fines imposed here are grossly disproportionate to the gravity of the offense, and therefore an arbitrary and capricious abuse of Respondents' discretion.

POINT III: RESPONDENTS UNCONSTITUTIONALLY INFRINGE ON PETITIONERS RIGHT TO FREE SPEECH IN THEIR ENFORCEMENT OF THE NYCAC AND RCNY.

Respondents' enforcement of Title 28 of the Administrative Code of the City of New York Article 502, including §§ 28-502.1, 28-502.2, and 28-502.6, and Title

1 of the Rules of the City of New York § 49 ("Rule 49") violates Petitioner's First Amendment rights.

Petitioners raised the free speech issue at the original hearings for this matter. A60, A85, A93, A103, and A116. However, ECB Appeals Board precedent has established that ECB is not the proper tribunal for the adjudication of constitutional claims. *See NYC v. 102.7 WNEW/Infinity Broadcasting Corp.*, Appeal Nos. 41228-41327 (January 27, 2004), *NYC v. Harlem Yacht Club*, Appeal Nos. 36316 & 36317 (May 25, 2004), and *NYC v. Mushekhay Yadgarov*, Appeal No. 1500277 (April 30, 2015).

In a case ruling on a sign ordinance similar to that enforced in New York City, *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), the Second Circuit Court of Appeals declared unconstitutional the Town of Islip sign ordinance which only permitted signs on business premises to display information concerning the name of the business or the goods and services offered. The Second Circuit Court found the Islip ordinance invalid because it was content-based. *Nat'l Advert. Co.*, 900 F.2d at 556. Because the ordinance only permitted the business name to be displayed on premises, the sign ordinance discriminated against noncommercial speech in favor of commercial speech.

Similarly, Respondents enforcement of the NYC sign regulations arbitrarily discriminates against noncommercial messages where a party is not permitted to promote his own law offices on a building he owns.

In 2015, the United States Supreme Court struck down a sign ordinance as a content based and unconstitutional regulation of speech in *Reed v. Town of Gilbert, AZ*, 135 S.Ct. 2218 (2015). The Supreme Court ruled that a regulation "is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S.Ct. at 2227. A sign ordinance with different rules for different categories of signs is "content based" if the categories are defined by the content or subject matter of the sign's message.

Respondents' enforcement of the NYC sign regulations treats certain signs differently depending on the content of the sign posted. Their distinction of treating a sign posted advertising the business corporation owned by the individual building owner differently from that promoting the legal practice of the building owner is content based regulation without any compelling government interest, and should be struck down. Here, the enforcement against Petitioners' signs is based only on the type of ownership structure, without any connection to public safety.

Prior to *Reed*, the Appellate Division, First Department, ruled that the NYC sign regulations related to arterial highways and public parks did not violate an Outdoor Advertising Company's right to free speech. *OTR Media Grp., Inc. v. City*

of New York, 83 A.D.3d 451, 452 (2011). However, that case involved the enforcement of the sign regulations against an actual Outdoor Advertising Company, which was in the business of advertising through signage. Petitioners are categorically outside of this definition, as discussed above. It also involved advertising for separate and distinct companies, as distinguished from the instant matter.

As a result, Respondents enforcement of the New York City sign regulations unconstitutionally infringes on Petitioners right to free speech, and therefore should be overruled.

CONCLUSION

The order of the Appellate Division, First Department, should be reversed. Petitioners respectfully request that this Court grant the relief requested in Petitioner's underlying Article 78 Petitions – annulling the determination of the ECB Appeals Board and finding that Respondents have acted in an arbitrary and capricious manner.

Dated: New York, New York
January 4, 2019

Respectfully submitted,

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Lindsay I. Garroway, Esq.

CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation, the corporate disclosure statement, the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section, and any addendum containing material required by subsection (h) of this Part is 4,392 words.

Dated: New York, New York
January 4, 2019

Respectfully submitted,

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Lindsay I. Garroway, Esq.

ADDENDUM

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Appeal No. 1401270 NYC v. Lam Kin February 26, 2015

Petitioner, the Fire Department (FDNY), appeals from a recommended decision and order dismissing a notice of violation (NOV), dated January 8, 2014, citing violations of the following Violation Categories (VCs), found in Section 109-02 of Title 3 of the Rules of the City of New York (RCNY):

VC 6	Failure to provide signs on outside doors indicating location of sprinkler dry-valve room
VC 6	Failure to indicate on sign the number of feet standpipe sprinkler curb shut-off valve is located
VC 7	Failure to paint caps of combination FDNY connection yellow
VC 7	Failure to paint sprinkler valve green at dry-valves and sprinkler valves
VC 8	Failure to remove obstructions (storage) from dry-valve in compactor room
VC 12	Failure to seal open all standpipe/sprinkler control valves with approved seals at City main, fire pump, dry-valves, sectional valves
VC 12	Failure to locate/provide access to standpipe/sprinkler curb shut-off valve
VC 12	Failure to provide low-point drains with drum-drip valves for both sprinkler dry-valve systems in garage
VC 12	Failure to have two sprinkler inspector test valves in accessible location under 7 feet high

At the hearing, Respondent's attorney moved to dismiss the NOV for improper party. The attorney asserted that Respondent was listed as "head officer" of the condominium at the cited premises on the Department of Housing Preservation and Development (HPD) registration summary report, a copy of which he submitted. Citing *NYC v. Howard Wong*,[1] *NYC v. Ari Schwertz Managing Agent*,[2] and *NYC v. Yaniz Erez*,[3] the attorney argued that Petitioner had failed to show that Respondent had direct or indirect control over the cited premises, or had dominion over the condominium that he used to commit fraud. Petitioner argued that Respondent had established an FDNY account and filed a certificate of correction for the NOV, showing that he had direct or indirect control over the premises.

[1] ECB Appeal No. 1301001, November 21, 2013.

[2] ECB Appeal No. 1100843, October 27, 2011.

[3] ECB Appeal Nos. 47557-47558, June 25, 2009.

Respondent's attorney also moved to dismiss the NOV for citing the incorrect year for the date of offense and date of service. The issuing officer (IO) testified that he was present at the premises to witness a test of the sprinkler system on January 8, 2014 and affixed the NOV on the lobby wall of the premises on that date, but inadvertently wrote "2013" as the year. Additionally, Respondent's attorney moved to dismiss for improper service after the IO testified that he did not ask the superintendent, who gave him access to the building, whether he was authorized to accept service on behalf of Respondent. Respondent's attorney submitted proof of correction before the first scheduled hearing date, and Petitioner recommended the mitigated penalties for all the cited charges.

The hearing officer found that Respondent was improperly named because Petitioner had not offered evidence that he managed the cited premises or exercised dominion over the condominium that he used to commit fraud.[4]

Issues presented on appeal

The issues on appeal are whether: (1) Respondent was a proper party to the violation; (2) the incorrect year cited for the date of offense and date of service rendered the NOV and service defective; and (3) the IO made a reasonable attempt to deliver the NOV to a person in the premises before he affixed it to the lobby wall.

The appeal

On appeal, Petitioner contends that the existence of an account in Respondent's name is proof that he has direct or indirect in control of the cited premises. Petitioner also contends that as a member of the condominium board of managers, Respondent has direct or indirect control of the premises. Petitioner notes that *Yaniz Erez* has been overruled by the Board to the extent that it held that the test for piercing the corporate veil applies to determining whether a respondent is properly cited as an owner.

Respondent did not answer the appeal.

Respondent a proper party

On this record, the Board finds that Respondent was a proper party to the violation. Section 202 of the Fire Code defines "owner" as:

> [t]he owner of the freehold of any real property . . . or of a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of real property.[5]

Here, Petitioner's records show that an FDNY permit account was established and has been maintained under Respondent's name since 2013. Additionally, the HPD registration

[4] Referring to the showing required to "'pierce the corporate veil' to prevent fraud or achieve equity" in *Matter of Morris v. NYS Dep't of Taxation and Finance*, 82 N.Y. 2d 141 (1993).

[5] The Fire Code is contained in Title 29 of the Administrative Code of the City of New York.

summary report indicates that Respondent is the "head officer" of the condominium association at the cited premises. On this evidence, the Board draws the reasonable inference that Respondent is directly or indirectly in control of the premises. *See NYC v. Eugene Anninos*.[6] The burden then shifted to Respondent to show that he is not directly or indirectly in control of the premises. Respondent's attorney made no assertion that Respondent is not directly or indirectly in control of the premises. The facts here are distinguishable from *Howard Wong* and *Ari Schertz Managing Agent*. In each of those cases, the respondent credibly challenged the inference that he was a person with control over the property at issue. Further, as noted by Petitioner on appeal, the Board overruled *Yaniz Erez* to the extent that it held that the test for piercing the corporate veil applies to determining whether a respondent is properly cited as an owner under the New York City Building Code.[7]

Incorrect year not a fatal defect

On this record, the Board finds that the incorrect year cited for the date of offense and date of service did not render the NOV and service defective. The "cure" date of February 12, 2014 and the first scheduled hearing date of February 24, 2014 indicated on the NOV fully comport with a violation date of January 8, 2014. At the hearing, Respondent's attorney made no claim of unfair surprise or prejudice. Indeed, he offered proof of correction before the first scheduled hearing date. Pursuant to Section 3-53 of 48 RCNY, the Board amends the NOV to cite a violation date of January 8, 2014. *See NYC v. Macpin Realty Corp*.[8] As to service, the IO testified that he actually affixed the NOV to the lobby wall on January 8, 2014 and mistakenly wrote the prior year on his affirmation of service. His testimony, undisputed by Respondent, was sufficient to establish that he effectuated service on January 7, 2014, notwithstanding the ministerial error on the affirmation of service. *See NYC v. Amieka D. Smith*.[9]

IO made a reasonable attempt

On this record, the Board finds that the IO made a reasonable attempt to deliver the NOV to a person in the premises before he affixed it to the lobby wall. Section 1049-a(d)(2) of the New York City Charter permits service of an NOV to an individual respondent by affixing such NOV in a conspicuous place to the cited premises after making a reasonable attempt to deliver the NOV to a person at the premises upon whom service may be made as provided by Article Three of the Civil Practice Law and Rules (CPLR). CPLR Section 308(1) authorizes delivery of the NOV "to the person to be served." CPLR Section 308(2) authorizes delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served . . . ."

Here, the IO testified that he went to the premises to witness a scheduled test of the sprinkler system. He testified further that only the plumber and superintendent were present for the

[6] ECB Appeal No. 1300217, June 27, 2013.

[7] *See NYC v. Oleksandr Nad* (ECB Appeal No. 1300741, October 31, 2013).

[8] ECB Appeal No. 1401154, January 29, 2015.

[9] ECB Appeal No. 1400823, October 30, 2014.

appointed test. He stated that after explaining the violations to the superintendent, he affixed the NOV to the lobby wall. Respondent's attorney argued that service was improper because the IO failed to inquire whether the superintendent was authorized to accept service on behalf of Respondent. However, personal service on an individual under CPLR Section 308 may only be made by delivery of the NOV "to the person to be served" or "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served . . . ." Respondent submitted no evidence that the premises was Respondent's actual place of business, dwelling place, or usual place of abode. The Board notes that the HPD registration summary report lists for Respondent an address different from the cited premises. Consequently, the Board concludes that the IO made a reasonable attempt to deliver the NOV to a person in the premises upon whom service may be made before affixing it to the lobby wall.

Accordingly, the Board reverses the hearing officer's recommended decision and order, sustains the violations of VCs 6, 7, 8, and 12, and imposes the respective mitigated penalties of $300, $300, $350, and $475.

Add.5

Appeal No. 1300741 NYC v. Oleksandr Nad October 31, 2013

Petitioner, Department of Buildings (DOB), appeals from a recommended decision and order dismiss a Class 1 violation of Section 28-105.12.2 of the Administrative Code of the City of New York (Code) for performing work that did not conform to approved construction documents and/or approved amendments. On the notice of violation (NOV), the issuing officer affirmed that on May 6, 2013, he observed demolition of a structure with a mechanical machine, a backhoe with a front-end loader, whereas the approved documents on file with DOB showed only hand demolition tools to be used.

The hearing

At the hearing, Petitioner's attorney submitted four photographs in evidence showing the backhoe used in the demolition project at the site. Respondent's authorized representative did not dispute the charge but moved to dismiss the NOV on the grounds that Respondent was improperly named individually as it was his company that performed the work. He submitted a copy of the permit for the job.

The administrative law judge (ALJ) credited Respondent's representative's assertion that the cited property was owned by Respondent's company, Nadkos, Inc., not by Respondent personally. [1] The ALJ therefore dismissed the NOV finding, citing the Board's decision in *NYC v. Yaniz Erez* (ECB Appeal Nos. 47557-47558, June 25, 2009). The issue on appeal is whether Respondent was properly named in the NOV.

Applicable Law

Code Section 28-105.12.2 provides:

> All work shall conform to the approved construction documents, and any approved amendments thereto. Changes and revisions during the course of construction shall conform to the amendment requirements of this code.

The appeal

On appeal, Petitioner's attorney contends that the ALJ erred in dismissing the NOV as under the 2008 Building Code, DOB may name an individual, even where his or her company is involved in a project. He asserts that the term"owner" under the 2008 Building Code is defined as "[a]ny person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of the premises." Petitioner's attorney contends that this definition includes contractors performing work on a premises as they have control of it while holding the permit for the ongoing construction project. Petitioner's attorney argues that if the permit is issued to the individual contractor, even if the contractor is part of a corporate entity, that individual is

[1] The Board clarifies that Respondent's representative did not assert that Nadkos, Inc. owned the cited property, but rather that it was doing all the work there. At any rate, as discussed below, responsibility for the violating condition is not based on having legal title to a cited property. The Board notes the ACRIS records submitted by Petitioner on appeal indicate neither Respondent nor Nadkos, Inc. as the cited property's title holder here.

deemed to have enough control to be named as respondent. He argues that because the permit for the demolition work at issue shows it to be issued to Respondent, Petitioner was not required to charge his company with the violation.

Respondent did not submit an answer to the appeal.

The Board's determination

The Board grants Petitioner's appeal.

Respondent was properly named

On this record, the Board finds that Respondent was properly named. As owner of Nadkos, Inc., Respondent had control over the company performing work at the site and was responsible for its demolition operations. Further, as the applicant of record for the permit issued for the demolition, Respondent was responsible for work prosecuted under that permit. Consequently, Respondent was a proper party to the violation. *See NYC v. Jared Lustbader* (ECB Appeal No. 1300692, September 26, 2013) (holding that respondent, the managing member of a construction company and the individual to whom work permits were issued, was properly charged for unsafe conditions at construction site).

The Board further finds the ALJ's reliance on the *Erez* decision to be misplaced. That decision was incorrect in applying the test for "piercing the corporate veil" to determine that a corporate president was not properly charged for a 1968 Building Code violation on property that his corporation owned. The "corporate veil" test is inconsistent with the definition of "owner" in both the 1968 and 2008 Building Codes. The "owner" definition looks, in relevant part, simply to whether the cited party controls the subject premises. It thus does not require, as *Erez* assumed, proof that an individual who is charged as "owner" both controlled the corporate owner and misused that control. The Board overrules *Erez* to the extent that it held that the test for piercing the corporate veil applies to determining whether a respondent is properly cited as an "owner" under the definition in the 1968 Building Code.

Accordingly, the ALJ's recommended decision and order is reversed and the NOV is sustained.