

***Dep't of Buildings v. 112-33 159 Street,
Queens, New York***

OATH Index No. 1672/17 (June 16, 2017)

In a default proceeding, evidence established that residential premises were being used for commercial vehicle storage, junk salvage storage, and as a contractor's yard. Closure recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
DEPARTMENT OF BUILDINGS
Petitioner
- against -
**OWNER & OCCUPANTS OF
112-33 159 STREET, QUEENS, NEW YORK**
Respondents

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This proceeding was referred pursuant to section 28-212.5 of the New York City Administrative Code. Petitioner, the New York City Department of Buildings ("Department" or "petitioner"), alleges that the premises at 112-33 159 Street, Queens, New York, also known as Block: 12178, Lot: 1, is located in a district zoned for residential use and is being used for commercial vehicle storage, junk salvage storage, and as a contractor's yard, in violation of the New York City Zoning Resolution (ALJ Ex. 1). Petitioner seeks an order of closure, pursuant to the "padlock law," to abate the nuisance. Admin. Code § 28-212.2 (Lexis 2017).

The trial was originally scheduled for May 3, 2017. On May 1, 2017, respondent Giacomo Brancato, owner of the premises, sent an e-mail to petitioner requesting an adjournment due to a family emergency. On May 3, 2017, Administrative Law Judge ("ALJ") John B. Spooner, with no objection from petitioner, granted the request and the trial was adjourned to May 24, 2017. On May 24, 2017, Mr. Brancato appeared and requested another adjournment, claiming that he needed more time to locate witnesses and documents.

Over petitioner's objection, ALJ Faye Lewis adjourned the trial to June 8, 2017, but marked the trial date as final absent exigent circumstances. On June 7, 2017, at 9:56 p.m., an e-mail from "brancatov@aol.com" was sent to petitioner by an unidentified sender purportedly on behalf of Mr. Brancato. The e-mail requested for Department inspectors to inspect the subject property and verify that there was no commercial or manufacturing activity taking place on the premises. It was signed "For Giacomo Brancato (he is in a business trip in Alabama)" (Pet. Ex. 1). At trial on June 8, 2017, Mr. Brancato failed to appear. Petitioner requested for respondents to be declared in default.

OATH rules require that a person appearing on behalf of a party "to file a notice of appearance with OATH." 48 RCNY § 1-11(a) (Lexis 2017). OATH rules also state that "[a]bsent extraordinary circumstances, no application may be made or argued by any attorney or other representative who has not filed a notice of appearance." 48 RCNY § 1-11(c). The case file for this matter contains no record of any person filing a notice of appearance on respondent's behalf. Therefore, to the extent the June 7 e-mail was an implied request for an adjournment or a request to excuse Mr. Brancato's failure to appear for trial, the e-mail will not be considered because it was apparently not sent by Mr. Brancato or by a representative who had filed the required notice of appearance.

Even if the e-mail was considered, Mr. Brancato's failure to appear would not be excused. OATH rules require all parties "to be present at OATH and prepared to proceed at the time scheduled for commencement of trial" and that the trial "will not be delayed . . . except for good cause as determined" by the ALJ. 48 RCNY § 1-45. The same "good cause" standard applies for any request for an adjournment, and the request must be made "as soon as the need for the adjournment becomes apparent." 48 RCNY § 1-32(b). Here, I find that a business trip to Alabama does not constitute good cause to delay or adjourn the trial, and that any implied request for an adjournment was not made in a timely fashion.

Upon respondents' failure to appear, petitioner presented proof that it served respondents with the petition and notice of hearing, pursuant to section 28-212.4 of the Administrative Code (ALJ Ex. 1). *See* Admin. Code § 28-212.4. Additionally, Mr. Brancato appeared at OATH on May 24, 2017, and, upon his request, was granted a new trial date of June 8, 2017. Accordingly, respondents were found in default, and the trial proceeded in the form of an inquest.

For the following reasons, I recommend that the petition be granted and that the Commissioner issue an order closing the premises.

ANALYSIS

The premises at issue are located in a R3A residential district in Queens (Pet. Exs. 4, 5). They contain a house with a private driveway. Petitioner's proof included certified reports of two inspections of the subject premises conducted by Department inspectors on May 14, 2016 and January 14, 2017 (Pet. Exs. 2, 3). The inspectors' reports indicate that lengths of metal and plastic materials were being stored on the driveway along with commercial vehicles.

During the May 14 inspection, lengths of metal and plastic pipes were observed stored along the fence of the private driveway and vehicles were observed parked on the driveway (Pet. Ex. 2). During the January 14 inspection no new changes were observed as the property appeared to continue to be used for the fabrication of metal products. Commercial vehicles were observed parked in front of and on the driveway, and lengths of steel along with other metals were observed stored on the property (Pet. Ex. 3). The inspectors' photographs of the location confirmed the presence of various metal materials and commercial vehicles (Pet. Exs. 2, 3).

Under sections 32-25, 42-14, and 42-15 of the Zoning Resolution, storage of commercial vehicles, contractors' yards, and junk storage are classified as use groups 16, 17, and 18 activities, respectively (Pet. Ex. 8). The Index of Uses found in Appendix A of the Zoning Resolution defines those activities as commercial and manufacturing uses that are not permitted in a residential zone.

Because of the impermissible use of the premises, the Commissioner may order closure of the premises pursuant to section 28-212.2 of the Administrative Code. *See* Admin. Code § 28-212.2.

FINDINGS AND CONCLUSIONS

1. Respondents were properly served with the petition and notice of hearing and found in default.
2. The premises, 112-33 159 Street, Queens, New York, are being used for commercial vehicle storage, junk salvage storage, and as a contractor's yard in violation of the Zoning Resolution.

RECOMMENDATION

In light of my findings, I recommend closure of the portion of the premises being used for commercial and manufacturing uses pursuant to section 28-212.2 of the Administrative Code. Closure is to be executed in a manner that will not impede ingress to or egress from any portion of the premises (if any) that is being used residentially.

Noel R. Garcia
Administrative Law Judge

June 16, 2017

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

APPEARANCES:

ALEX J. BERGER, ESQ.
Attorney for the Petitioner

No Appearance by or for Respondents