

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION
Inspection No. 207202407170025

Shopsmart Convenience DBA The Garden

Respondent.

Respondent requested an emergency hearing on July 19, 2024, which was made within seven (7) calendar days of the date of the inspection which occurred on July 17, 2024.

The emergency hearing was conducted on July 24, 2024 which is within three (3) business days of the Respondent's request.

The Respondent was represented James Kirshner, Esq.

The Office of Cannabis Management (hereinafter "OCM") was represented by Michael Waller, Esq.

Investigative Specialist Joshua Coons testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation indicate that the Respondent was offering cannabis products, as defined by Cannabis Law Article 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 370B 3rd Ave. New York, New York 10016.

The scope of the emergency hearing was limited solely to the issue as to whether or not the padlocking provisions Cannabis Law Article 6 § 138-b of have been met by a preponderance of the evidence.

Prior to the start of the hearing, two preliminary matters were raised by Respondent's counsel. Mr. Kirshner argued that the Order to Seal should be dismissed for lack of personal jurisdiction due to failure to properly serve the Notice of Violation, Order to Cease Unlicensed Activity, and Order to Seal, in accordance with the law. He also argued that the exhibits provided by OCM should be precluded as they were not sent within the timeframe requested on the Notice of Hearing.

The Notice of Hearing sent to counsel in this matter, states “[p]arties shall exchange copies of any and all exhibits which they intend to introduce at the hearing, as well as provide a copy to the Office of Administrative Hearings...no later than COB on July 23, 2024. There is no dispute that the exhibits in this case were sent by Mr. Waller's office at 10:58pm on July 23, 2024, approximately 6 hours after close of business. Mr. Kirshner was asked repeatedly if he wished to adjourn the hearing in order to have additional time to prepare. Mr. Waller consented to an adjournment, if requested. Mr. Kirshner declined. Additionally, he declined to provide an explanation as to how he was prejudiced by the delay. OCM Regulation §133.15 states, “[t]here shall be no disclosure, including, but not limited to, bills of particulars, exchanges of documents and witness lists, depositions, interrogatories, discovery and requests for documents, except as provided for in subdivisions (b) and (c) of this section. An administrative law judge may not require disclosure. When the parties agree to any form of disclosure, the administrative law judge shall ensure that all parties proceed in accordance with the agreement of the parties.” The request that exhibits are produced by close of business is made by The Office of Administrative Hearings in order to ensure each party has a reasonable amount of time to review and prepare. However, it is not a requirement of the OCM regulations, The Cannabis Law, or the State Administrative Procedure Act.

During the hearing, OCM entered into evidence Exhibit A, The Notice of Violation, Order to Cease Unlicensed Activity and Order to Seal. Investigator Coons testified that during the inspection, the store's employee took a copy of Exhibit A and stated he would provide it to the owner but declined to provide a business address for the owner or their name. Investigator Coons explained that he believed this individual was the store's employee as they were in the store with The Department of Tax and Finance entered, and they had the remote control to the gate. He also testified that he posted a copy of Exhibit A, as well as a warning sticker to the front of the building (Exhibit D1-4). OCM Regulation §133.25 (g)(1)- (3) establishes how service is to be effectuated in cases where an Order to Seal has been issued. It states in sum, that OCM will personally deliver the document to the business owner, or another employee of suitable age or discretion in actual or apparent control of the premises, that the order will be delivered by certified mail within 5 days to the owner at any address provided by the person to whom the order was delivered, and that the office will post a copy in a conspicuous place on the premises.

There is no dispute that the Respondent was on notice of this hearing. Mr. Kirshner's argument is that the case should be dismissed if one prong of the service requirement was not met. However, Courts have declined to dismiss cases due to imperfect service and have at times given the moving party time to correct service. Though this hearing is not subject to the CPLR or the

Fed. R. Civ. P., the analysis underlying the case law related to service issues generally, is persuasive. Whether the Respondent was actually on notice of the proceeding, is relevant in deciding whether the matter should be dismissed for lack of personal jurisdiction due to the service requirements not being met. “In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”” (Ruffin v. Lion Corp., 15 N.Y.3d 578, 582–83, 940 N.E.2d 909, 911 (2010) *citing* Raschel v. Rish, 69 N.Y.2d 694, 696, 512 N.Y.S.2d 22, 504 N.E.2d 389 [1986], *quoting* *583 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 339 U.S. 306, 94 L.Ed. 865 [1950]) In this case, the owner was put on notice of the Order to Seal. Given that Investigator Coons was not provided the home address of the owner, the Order to Seal and other documents could only have been mailed to the premises. It is within the Trier of Fact’s discretion as to whether the defect in service is so large as to wrest jurisdiction out of her hands. “The court had the authority under CPLR 2001 to simply disregard any issues with the filing of either Conrey's or Frazier's motions, because no party alleged or demonstrated that a substantial right had been prejudiced.” (Conrey v. Tellone, 151 A.D.3d 655, 656, 58 N.Y.S.3d 345, 347 (2017)) Additional relevant factors in deciding whether service was so defective as to warrant dismissal include, “ (1) whether the delay resulted from inadvertence or whether a reasonable effort to effect service has occurred, (2) prejudice to the defendant, and (3) whether the plaintiff had moved for an extension of time to serve. Echevarria v. Dep't of Corr. Servs., 48 F. Supp. 2d 388, 392 (S.D.N.Y. 1999).” Null v. Bank of Am., N.A., No. 23-CV-8343 (JPO), 2024 WL 2274301, at *1 (S.D.N.Y. May 20, 2024) Here OCM did not have a personal address for the business owner and had already notified them via the other two methods of service required by the statute. As Respondent requested a hearing two days after the Order to Seal was issued, and appeared through an attorney at the hearing, there does not appear to be any prejudice to Respondent. OCM did not move for an extension of time to serve, however the service issue was not plead with sufficient specificity at the inception of the hearing, and thus Respondent’s complaint as to the service issue was not clear until Respondent’s summation. Though service in this case did not meet the requirements of the regulations, the defect did not rise to such a level that it required dismissal due to lack of personal jurisdiction.

APPLICABLE LAW

Cannabis Law Article 6 §138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section.”

Cannabis Law Article 6 § 138-b(1) provides that orders to seal: In addition to any other authority conferred in this chapter, pursuant to the provisions of this section, the board or the office shall have the authority to issue an order to seal the building or premises of any business engaged in unlicensed activity, when such activity is conducted, maintained, or permitted in such building or premises, occupied as a place of business as described in subdivision eight of section ten of this chapter, in violation of subdivision one or one-a of section one hundred twenty-five or subdivision one or eight or section one hundred thirty-two of this article.

Cannabis Law Article 6 §138-b(6) provides that an order to seal may be issued by the office or the board pursuant to subdivision three of this section only if:

- (a) no part of the premises to be sealed is used in part as a residence and pursuant to local law or ordinance is zoned and lawfully occupied as a residence; and
- (b) the unlicensed activity as described in this section is more than a de minimis part of the business activity on the premises or in the building to be sealed pursuant to this subdivision, the office shall issue a notice of violation and order to cease the unlicensed conduct, which shall constitute notice that such activity must cease immediately. (See Regulations at 9 NYCRR 133.25(f)(2-3)).

Cannabis Law Article 6 §138-b(7) provides that in assessing whether unlicensed activity within a building is more than de minimis, the office or board, as relevant, shall consider factors such as any one or more of the following:

- (a) the presence of signs or symbols, indoors or out, advertising the sale of cannabis or otherwise indicating that cannabis is sold on the premises;
- (b) information shared in any advertisements or other marketing content in connection with the unlicensed business activity and any direct or indirect sales of cannabis or other conduct in violation of this chapter;
- (c) the volume of illicit cannabis products on site; and
- (d) the variety of illicit cannabis products on site. (See Regulations at 9 NYCRR 133.25(f)(3)(i-iv)).

Cannabis Law Article 6 §138-b (3) provides that the office may issue an order to seal with an immediate effective date if such order is based upon a finding by the office of an imminent threat to the public health, safety and welfare. (See Regulations at 9 NYCRR 133.25(f)(1)).

Cannabis Law Article 6 §138-b(4) sets forth the factors that determine an imminent threat to public health, safety, and welfare shall be limited to:

- (a) documented sales to minors;
- (b) unlicensed processing of cannabis products at the building or premises;

- (c) orders issued following an inspection wherein the person engaged in the unlicensed activity engaged in violent, tumultuous, or other behaviors indicating expressed intent to not comply with the office's order to cease the unlicensed activity;
- (d) documented presence of unlawful firearms at the building or premises;
- (e) proximity of the building or premises to schools, houses of worship, or public youth facilities;
- (f) presence of products deemed unsafe based on reports of illness or hospitalization; or
- (g) sales of, or offers to sell, cannabis products not tested or labeled lawfully in accordance with this chapter. (See Regulations at 9 NYCRR 133.25(f)(1)(i-vii).

FINDINGS OF FACT

1. Respondent was offering cannabis products for sale without a license issued by OCM. Investigator Coons testified that he has training and experience in identifying cannabis. He explained that when identifying whether a location is selling illicit cannabis product he looks at warning labels on packaging which details whether the product contains cannabis, he looks at signage inside and out in the window or on sandwich boards, and that he also looks for points of service systems, cashdrawers, receipts and price tags on items. During the course of the hearing Investigator Coons testified about Exhibit B. He explained that the location offered the following items for sale: pre rolls, cannabis flower, vape cartridges, live resin, cannabis concentrate, edibles including a cannabis infused punch bar. (See Exhibit C and D) Evidence was also presented that demonstrated The Garden was selling products in that they had a point of sale system (Exhibit B3). Additionally, a receipt entitled Shopsmart Convenience with the store's business address was observed at the premises (Exhibit B4).

2. During the hearing, Investigator Coons testified that no part of the premises that were sealed were used in part as a residence or pursuant to local law or ordinance, was zoned and lawfully occupied as a "residence." He stated that he did not observe a kitchen or shower, and that the premises appeared to be a commercial property.

3. The unlicensed activity which warranted an order to seal constituted more than a "de minimis" part the business activity, in that there was a wide variety and volume of illicit cannabis products on site. The Garden, as evidenced by Exhibit B 12, had its own branded cannabis flower. A large variety of brands were observed on the products at the location, including, but not limited to: Sherbinskis, Raw Garden, Sauce, Stiiizy, Loud Snacks, Fidels, Punch Bar, The Baker Los Angeles, Terra, Camino, To The Moon, and Fryd. (See Exhibit B and Exhibit C). There was also a large variety of types of cannabis product, including multiple strains of unbranded flower, vape cartridges, concentrate, pre-rolls, live resin, and edibles, some brands offering multiple product types. The volume of product can be observed from the picture of the inside of the premises in B2. Close ups of the glass cases are featured in Exhibits C1, C7, and

C8. Each cabinet contains many products, and as seen in Exhibits C16, C17, C18, there is surplus product located in the drawers underneath the cases.

4. The unlicensed activity occurring at The Garden constituted an imminent threat to public health, safety, and welfare in that: there were sales of, or offers to sell, cannabis products that were not tested or labeled lawfully in accordance with the Cannabis Law Article 6. Investigator Coons testified that products in the following Exhibits contained California cannabis warning labels: B12, B13, B14, B16, B17, B18, B19, B22, B23, C2, C13, C14. He also stated that he believed Exhibit 21 contained the cannabis warning label for Oklahoma. Additionally, loose flower in a number of varieties, without a New York State warning label, can be observed in multiple containers and bags in Exhibits B and C. There was also evidence that unlicensed processing of cannabis products was occurring at the building or premises. The Garden had shop specific branding on mylar bags that can be seen in their filled form in Exhibit C24. Exhibit B9 depicts a blender with cannabis flower residue. Exhibit B10 depicts a pre-roll machine, and Exhibits B11 and B12 contain a scale with cannabis flower residue and The Garden's branded mylar bag. It should be of note that The Garden's own mylar bag is labeled with the California cannabis warning label.

WHEREFORE, PURSUANT TO CANNABIS LAW ARTICLE 6 §138-b (9), THE ORDER TO SEAL, ISSUED ON JULY 17, 2024, IS HEREBY EXTENDED FOR ONE YEAR FROM THE DATE OF THIS DECISION.

Dated: July 30, 2024

Laurie Cartwright
Administrative Law Judge

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described in Regulations at 9 NYCRR 133.25(k). This decision was sent via email on July 30, 2024 to the following:

Nickolas Perry
Sheila Wagner
Michael Waller, Esq.
James Kirshner, Esq.