

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
CANNABIS CONTROL BOARD

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IN THE MATTER OF
ZEN ZONE 1 CORP.,

APPELLANT-RESPONDENT,
-against-

DECISION ON APPEAL

NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT,
APPELLEE-PETITIONER.

Inspection No.:
115202406040005

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Application by Appellant-Respondent Zen Zone 1 Corporation (“Appellant”) appealing from a decision and order of the Office of Administrative Hearings (“OAH”) wherein the presiding Administrative Law Judge (“ALJ”) extended a sealing order issued against Appellant’s business. The sealing order was issued by Appellee-Petitioner New York State Office of Cannabis Management (“OCM”) pursuant to New York State Cannabis Law (“Cannabis Law”) Article 6 §§ 138-a and 138-b and Title 9 of the Codes, Rules, and Regulations of the State of New York (“NYCRR”) § 133.25.

Appellee- Petitioner OCM (“Appellee”), conducted a regulatory inspection of Appellant’s place of business and determined Appellant was engaging in unlicensed activity of cannabis and products marketed as cannabis in violation of the Cannabis Law and implementing regulations. Following the inspection, Appellee issued a Notice of Violation (“NOV”), an Order to Cease Unlicensed Activity (“Cease Order”) and an immediate Order to Seal (“OTS”) for Appellant’s place of business because the unlicensed activity posed an imminent threat to the public health, safety, and welfare. Appellant requested a hearing with the OAH. After a hearing was held, the presiding ALJ issued a decision extending the Order to Seal for one year. Appellant takes exception to the ALJ’s decision and has submitted the instant administrative appeal, and the exceptions noted therein to the Cannabis Control Board (“Board”) for review pursuant to Cannabis Law §§ 10(18) and 17(8) and 9 NYCRR § 133.25(k).

BACKGROUND

In March 2021, New York enacted the Marihuana Regulation and Taxation Act (“MRTA”). The MRTA legalized recreational adult use of marijuana and created a regulated cannabis industry. The Cannabis Law governs medical cannabis (Cannabis Law Article 3), adult-use cannabis (Cannabis Law Article 4), and cannabinoid hemp and hemp extract (Cannabis Law Article 5). The Cannabis Law also contains general provisions, (Cannabis Law Article 6), including the enforcement framework, that apply to the entire regulatory program. Appellee is the

regulatory agency for the cannabis industry in New York.

Cannabis Law § 125 states that “[n]o person¹ shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, within the state without first obtaining the appropriate registration, license or permit” that is required under the law. Appellee is authorized to conduct, without notice, site visits, inspections, or investigations of any person and any premises cultivating, processing, distributing, selling, or offering for sale cannabis, cannabis product, cannabinoid hemp or cannabinoid hemp extract product, or any product marketed or labeled as such in this state, or engaging in an indirect retail sale, without obtaining the appropriate registration, license, or permit. (Cannabis Law § 138-a and 9 NYCRR § 133.25). In response to a violation of the Cannabis Law, and related regulations, Appellee is authorized to take various actions, including issuing a notice of violation, an order to cease unlicensed activities, and an immediate order to seal the premises. (Cannabis Law §§ 138-a and 138-b).

Appellee can issue an immediate “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”² and upon a finding of an imminent threat³ to public health, safety, and welfare. (Cannabis Law § 138-b; 9 NYCRR § 133.25[f]). Upon finding such an imminent threat, an order to seal may be issued 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 zone and lawfully occupied as a residence; and (b) the unlicensed activity . . . is more than a de minimis⁴ part of the business activity on the premises or in the building to be sealed pursuant to the order.

When Appellee issues an immediate sealing order, Cannabis Law § 138-b(2) provides that a copy “shall be served by delivery of the order to the owner of the business or other person of suitable age or discretion in actual or apparent control of the premises at the time of the inspection and shall be posted at the building or premises that have been sealed, secured and closed.” Section

¹ Cannabis Law § 3(40-a) broadly defines person “an individual, institution, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other entity.”

² “[P]lace of business” shall not include a residence or other real property not otherwise held out as open to the public or otherwise being utilized in a business or commercial manner or any private vehicle on or about the same such property, unless probable cause exists to believe that such residence, real property, or vehicle are being used in such business or commercial manner as described herein.” Cannabis Law § 10(8).

³ In assessing whether there is an imminent threat to public health, safety, and welfare, Cannabis Law § 138-b(4) provides factors Appellee shall consider.

⁴ In assessing whether unlicensed activity within a building or premises is more than a de minimis part of the business activity at the premises, Appellee shall consider the factors set forth in Cannabis Law § 138-b(7).

138-b(2) further provides that “[a] copy of the order shall also be mailed to any address for the owner of the business at any address provided by the person to whom such order was delivered pursuant to this subdivision.” Subdivision (10) of section 138-b provides that a copy of the sealing order shall be mailed, within five (5) days of being issued, by certified mail, to the person currently holding ownership over the real estate affected by the sealing order, as recorded in the city register or county clerk, and such mailing “shall constitute notice to the owner and shall be deemed to be complete upon such mailing by the office.”

After the issuance of an order to seal pursuant to Cannabis Law § 138-b, an emergency hearing can be requested on the order to seal. An emergency hearing must be requested within seven (7) calendar days of the date of the order to seal and shall be held within three business days of such request provided that the respondent has submitted a verified statement with the request. (Cannabis Law § 138[b][3]; 9 NYCRR § 133.25[h][3]).

Following the hearing, the presiding ALJ shall prepare a written decision based on the ALJ’s findings of facts and conclusions of law. (9 NYCRR § 133.25[i][2]). Within thirty (30) days of the issuance of the ALJ’s determination, any party may submit an appeal of the ALJ’s determination to the Board and such appeal shall be based solely on the record on appeal. (9 NYCRR § 133.25[k]).

In this matter, Appellant timely filed the instant appeal on August 19, 2024, and asserts the ALJ erroneously extended the Order to Seal because Appellee failed to establish proper and sufficient service of the sealing order and failed to establish the name of the business inspected.

ISSUES ON APPEAL

Whether there was sufficient evidence establishing proper service, in accordance with Cannabis Law 138-b, and sufficient evidence establishing Appellant’s business, Zen Zone 1 Corp., was the appropriate business name to charge in the proceeding.

FINDINGS OF FACT

The Board accepts the credibility findings of the ALJ and finds no basis in the hearing record to depart from them here. Accordingly, we find the following facts.

Regulatory Inspection

Appellant conducts business as Zen Zone 1 Corp. at 2846 Church Avenue, Brooklyn, New York, 11226. On June 4, 2024, Appellee conducted a regulatory inspection, Inspection Number 115202406040005, of Appellant’s business. Based on observations during the inspection, Appellee issued: a NOV indicating that Appellant was in violation of Cannabis Law §§ 125 and 132 as well

as 9 NYCRR 120(i); a Cease Order pursuant to Cannabis Law § 138-a and 9 NYCRR § 133.25; and an Order to Seal pursuant to Cannabis Law § 138-b. Appellant, through counsel, timely requested an emergency hearing regarding the Order to Seal issued by Appellee. At the time of request, Appellant's counsel filed a Verified Statement. Appellant attested to ownership and confirmed the business name and location as Zen Zone 1 Corp located at 2846 Church Avenue, in Brooklyn, New York, 11226.

Administrative Proceedings

A hearing was held on June 11, 2024, before ALJ Laurie Cartwright. Both Appellant and Appellee were represented by counsel. The scope of the hearing was limited to whether the provisions of Cannabis Law Article 6 § 138-b were met by a preponderance of the evidence. Neither party filed motion papers nor raised any affirmative defenses pre-hearing.

Appellee presented evidence, including testimony of two witnesses and exhibits in support of its argument that the Order to Seal was properly issued. Appellee's first witness was OCM Investigator Lawson. Investigator Lawson testified that the Appellant was not licensed by Appellee to sell cannabis. He further testified that a review of the premises revealed that it was not being used as a residence, but as a commercial property. Upon entering the location, Investigator Lawson testified to observing someone positioned behind the counter, near the cash register. The individual was identified as a store employee. Based on these observations, the Investigator determined the individual was of suitable age and discretion and was in apparent control of the business.

The Investigator also observed adult-use cannabis products, including some products marketed for sale bearing the California cannabis logo. The Investigator identified numerous photographs of the items observed that were taken during the inspection, including a plastic bag behind the counter filled with pre-rolls, in addition to three large containers with loose cannabis flower, a scale on a nearby shelf, advertisement for the sale of various strands of cannabis and with information for each written on a board for prospective customers. There was also evidence of individual bags of what the Investigator described as cannabis flower that were in a drawer near the cashier. Based on his observations during the inspection, the Investigator determined that the unlicensed activity posed an imminent threat to public health, safety, and welfare, and that the sale of the unlicensed cannabis was more than a de minimis part of Appellant's business.

Investigator Lawson identified the Order to Seal, NOV, and Cease Order, issued to Appellant. He testified to having prepared the document following the inspection of Appellant's business. He attempted personal service on the individual in the store that was identified as an employee, but the individual refused to accept service. As such, the Investigator documented the

refusal on the Certificate of Service and a copy of the order was left in the vicinity of the individual and another copy was conspicuously posted on the exterior of the business premises.

Appellee called an additional witness, Ms. Bovell, to attest to the mailing of the Order to Seal to Appellant's business address. The Affirmation of Service by Mailing was identified by the witness, who testified that she completed and signed the form after mailing a copy of the order to business owner at the address inspected.

Appellant did not call any witnesses or submit any exhibits. Appellant argued in closing that there was insufficient evidence to establish that Appellant's business, Zen Zone 1 Corp., was the appropriate business name to be noticed in the NOV, Cease Order, and Order to Seal. Appellant asserted that the only information Appellee offered was the testimony of the Investigator. Appellant argued that aside from the testimony, there was no evidence, photographs, certificate of authority, receipts, or invoices, found at the location that showed the address or the name of the business. Appellant pointed to Appellee's evidence which included a photograph of the front of the premises with a sign that read "Fiend City." Appellant further asserted that the timing of the mailing of the documents raised a question as to whether it was proper service given that the attestation stated the mailing occurred one day prior to the hearing. Appellee maintained, in closing, that proper and sufficient service was made and that the evidence, including the testimony of the Investigator, supported a finding that Zen Zone 1 Corp. was the appropriate party to charge.

ALJ Decision

On June 14, 2024, the ALJ issued a decision. In her decision, the ALJ set forth the factual findings that Appellant was offering cannabis products for sale without a license, the unlicensed activity constituted an imminent threat to the public health, safety, and welfare, and the unlicensed activity constituted more than a de minimis part of the business activity.

The ALJ rejected Appellant's argument that there was insufficient evidence to show that Zen Zone 1 Corp. was the business entity operating at the premises that was the subject of the inspection and thus the appropriate entity to charge. The ALJ concluded that while it would have been helpful for Appellee to present evidence connecting the sign on the exterior of the premises, "Fiend City" to the Appellant, the record contained sufficient evidence to establish it was Appellant operating at the location. Additionally, the ALJ considered the verified affidavit submitted by Appellant, which identified Appellant's business as Zen Zone 1 Corp. and identified the business address as 2846 Church Avenue, Brooklyn, New York, 11226. The ALJ further reasoned that the Appellant submitted to personal jurisdiction by requesting the hearing, appearing at the hearing, and had not raised the argument prior to or during the hearing,

Arguments on Appeal

In their appeal, Appellant asserts that the ALJ erred in disregarding the jurisdictional requirements. Specifically, Appellant argues that there was no evidence presented during the hearing to show the sealing order was mailed to the owner of the real estate. Appellant maintains that service requirements articulated within subdivisions (2) and (10) of Cannabis Law § 138-b are jurisdictional prerequisites that must be established before any sealing order pursuant to Cannabis Law § 138-b can be enforced, sustained, and/or extended to close a business. Appellant also asserts the ALJ erred in extending the Order to Seal since the evidence presented during the hearing failed to establish that Zen Zone 1 Corp. was the correct business named as part of the proceeding. Appellant maintains that other than the NOV indicating Zen Zone 1 Corp. as the business investigated and inspected, there was no other evidence presented to show Appellant was the correct business to prosecute.

Appellee maintains proper and sufficient service of the Order to Seal was demonstrated by a preponderance of the evidence in accordance with the jurisdictional requirements mandated by Cannabis Law § 138-b. Appellee argues that three methods of service were effectuated on Appellant, service on the individual identified as an employee, the conspicuous posting of the order, and the mailing to Appellant's business address. Appellee further asserts that because Appellant is not the real property owner, Appellant cannot raise a challenge with respect to notice under subdivision (10) of Cannabis Law § 138-b. Lastly, Appellee maintains Appellant's argument regarding insufficient evidence of the business name inspected is erroneous because there was evidence establishing that Zen Zone 1, Corp. was the appropriate business name. Appellee also argues that Appellant's own hearing request identified the location inspected as Zen Zone 1 Corp. Finally, Appellee argues that Appellant failed to dispute or offer evidence that they were not in control of the premises inspected.

OPINION AND REASONING

A review of the instant record, including the hearing transcript, the ALJ's decision, and memorandum submitted by the parties, reflects that the ALJ considered the arguments, and the evidence at the hearing to support the decision in the case. While a party's appearance at a hearing should not deem service requisites satisfied, here there appears to be no dispute that service of the Order to Seal was effectuated on Appellant. In fact, Appellant does not claim a copy of the order was not received. Rather, Appellant argues that the lack of evidence at the hearing establishing mailing to the real estate owner renders the service methods effectuated against Appellant insufficient to meet the jurisdictional mandates of Cannabis Law 138-b. Appellant has not cited or

offered any support for their argument. The Board disagrees with Appellant under the facts of this case.

First, a review of the timing set forth in Cannabis Law § 138-b suggests that the legislature did not intend to require evidence of mailing to the real estate owner at the hearing as a jurisdictional prerequisite or otherwise necessary element at an emergency hearing on a sealing order. When taken as a whole, the timing set forth in Cannabis Law § 138-b could result in an emergency hearing taking place within five calendar days following the issuance of a sealing order. An order to seal issued pursuant to § 138-b shall state the procedure to request a hearing within seven (7) days.⁵ (Cannabis Law § 138-b[2]). The hearing is required to be held within three (3) business days of the request. (Cannabis Law § 138-b[3]). The mailing to the real estate owner shall be sent within five (5) days⁶ following the issuance of a sealing order. (Cannabis Law § 138-b [10]). This timing would suggest that evidence of mailing to the real estate owner was not intended to be a necessary element established at a hearing on an order to seal issued pursuant to Cannabis Law § 138-b. For example, a hearing could be requested the same day a sealing order is issued and the hearing then held within three business days. This would result in a hearing being held before service to the real estate owner is mandated under the law. Moreover, the Cannabis Law provides separate relief where a real estate owner, or building owner, can file a request to vacate a sealing order with providing information that the issue has been abated. If at any time a respondent vacates the building or premises subject to an order to seal issued by the office or board, or if the building owner provides sufficient proof thereof, any action or proceeding filed in accordance with these procedures relating to such building or premises shall be withdrawn by the office or the board without prejudice, and any order to seal shall be vacated. (Cannabis Law § 138-b[11]).

Furthermore, the defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served (see Lehman Brothers Bank v Hickson, 186 AD3d 1348 [2d Dept. 2020]; Rhoe v Reid, 166 AD3d 919 [2d Dept. 2018]; Rhoades v Westchester County Bd. of Elections, 115 AD3d 958 [2d Dept. 2014]; Wells Fargo Bank, N.A. v Bowie, 89 ad3D 931 [2d Dept. 2011]; Home Sav. of America, F.A. v Gkanios, 233 AD2d 422 [2d Dept. 1996]; Advance Serv. Grp., LLC v. Vision Home Builders LLC, 83 Misc.3d 1230(A), 2024 N.Y. Slip Op. 50843(U) [Sup Ct, Kings County 2024]). Thus, Appellant cannot raise a challenge based on improper service on behalf of another party, here the real property owner. Furthermore, the defense of lack of personal jurisdiction is an affirmative defense that must be raised in a party's pre-hearing papers, pursuant to 9 NYCRR § 133.12(c). Appellant did not make

⁵ Cannabis Law § 138-b(2) does not specify whether the request must be made within seven (7) calendar days or business days. Whereas, § 138-b(3) specifies that the requested hearing must be held within three (3) business days.

⁶ Cannabis Law § 138-b(10) does not specify calendar or business days.

any pre-hearing motions challenging personal jurisdiction. It has long been established that a party impliedly consents to personal jurisdiction through litigation-related conduct such as voluntary in-court appearance. Fuld v. Palestine Liberation Org., 82 F.4th 74, 89 (2d Cir. 2023) *citing* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982).

Additionally, there is no merit to the argument that the ALJ lacked jurisdiction to adjudicate the matter due to improper service. The jurisdiction and powers of an administrative body derives from the statute which created it. (Drolet v. New York State Racing & Wagering Bd., 115 Misc. 2d 7, 10 (1982) *citing* Foy v. Schechter, 1 N.Y.2d 604 [1956]). In this case, the OAH, through the service of ALJs, is authorized pursuant to 9 NYRR § 133.16 to conduct all adjudicatory proceedings which devolve upon the Board by requirement of statute. As such, there is no question the OAH and the presiding ALJ had subject matter jurisdiction over the proceeding. The reliance on technicalities to overcome the service that was effectuated is not persuasive, particularly where no allegations of prejudice have been asserted by Appellant either at the hearing or in the exceptions noted in the instant appeal. (See, e.g., Buscher v. Ehrich, 12 A.D.2d 887, 888 [1961]).

Finally, the Board disagrees with Appellant that the sealing order was erroneously extended due to a lack of sufficient evidence establishing Appellant's business, Zen Zone 1 Corp, was the appropriate business name to charge in the instant proceeding. In their appeal, Appellant acknowledged that the NOV, Cease Order, and Order to Seal document, admitted into evidence at the hearing, identified the business as Zen Zone 1 Corp at 2846 Church Avenue, Brooklyn, NY. Appellant did not argue prior to the hearing, at the hearing, or on appeal, they were denied notice or that the NOV, Cease Order, and Order to Seal were otherwise facially insufficient. The record includes evidence identifying the business inspected, most notably the NOV, Cease Order, and the Order to Seal, which Appellant acknowledges in their appeal. Furthermore, the ALJ relied on the verified affidavit submitted by the Appellant with the request for the hearing in which the business name, Zen Zone 1 Corp., was provided as the name for the premises inspected at 2846 Church Avenue, Brooklyn, NY.

Following a review of the record on appeal, the Board finds that the ALJ's decision to extend the Order to Seal was in accordance with Cannabis Law § 138-b and the preponderance of the evidence at the hearing. The ALJ's determination was based, in large part, on the credibility determination of Appellee's witness and the evidence presented. The Court of Appeals has long held "the credibility of witnesses is a determination within the domain of the trier of the facts, the person who has the opportunity to view the witnesses first hand and evaluate the relevance and truthfulness of their testimony (see Berenhaus v. Ward, 70 NY2d 436 [1987]; Collins v. Codd, 38

N.Y.2d 269 [1976]). In this matter, Appellant has not demonstrated a basis to support disturbing the ALJ's findings as to the credibility of the evidence.

CONCLUSION

Based on the foregoing, the Board finds that the ALJ did not err in refusing to dismiss the matter for lack of jurisdiction based on a claim of defective service nor did the ALJ err in refusing to dismiss the matter for lack of evidence that the correct business was prosecuted and thus the Order to Seal was not erroneously extended. Accordingly, the decision of the Administrative Law Judge is affirmed.

The foregoing constitutes the final decision of the Board.

DATE: February 14, 2025