

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:	
	:	
FELIX J. TERRAFERMA JR. AND BLUE CHIP	:	
FISH & CLAM CO. INC. (T/A BLUE CHIP FISH	:	
MARKET),	:	
	:	
Petitioners,	:	DOCKET NO. PR 16-091
	:	
To Review Under Section 101 of the Labor Law:	:	<u>RESOLUTION OF DECISION</u>
An Order to Comply with Article 19, and an Order :	:	
Under Article 19 of the Labor Law, both dated August :	:	
13, 2014,	:	
	:	
- against -	:	
	:	
THE COMMISSIONER OF LABOR,	:	
	:	
Respondent.	:	
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APPEARANCES

Stephen Sherman, Bohemia, for petitioners.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry* of counsel), for respondent.

WHEREAS:

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals (Board) on July 25, 2016. The Board served the petition on respondent Commissioner of Labor on July 28, 2016. Respondent moved on August 26, 2016, to dismiss the petition as untimely because it was filed more than 60 days after the orders being appealed were issued. Pursuant to a briefing schedule set by the Board at a November 15, 2016 telephonic case-management conference, the parties submitted supplemental briefing.

At issue is whether respondent provided proper notice under Labor Law § 33. Labor Law § 101 (1) provides that a petition for review of orders issued by the Commissioner must be filed within 60 days of the date the orders were issued. Labor Law § 33 permits respondent to serve orders by mail to individuals at their last known place of business so long as the mailing is reasonably calculated to give notice (*Matter of Chan*, PR 14-072 at 2 [interim decision, Sept. 24, 2014]; *Matter of Gambino*, PR 10-150 at 3 n1 [interim decision, Nov. 18, 2010]). It is undisputed that the petition for review was untimely filed. Petitioners contend that they did not receive notice until after the statutory limitations period had lapsed.

At the case-management conference petitioners acknowledged that petitioner Terraferma owns the building located at 2136 Jericho Turnpike, New Hyde Park, New York, 11040. To support their contention that petitioners did not receive proper notice, petitioners submitted a leasing agreement between petitioner Terraferma and leaseholder Otaka Sushi Inc., for a term from December 1, 2012, to November 30, 2017, for the purpose of establishing an “Chinese/Japanese fusion [sic] restaurant” at 2136 Jericho Turnpike. That petitioner Terraferma may have leased all or some portion of the property to a separate entity does not preclude petitioners from conduction business from the same address. Furthermore, petitioners admitted at the November 15, 2016, case-management conference that petitioner Blue Chip Fish & Clam Co. continues to do business out of 2136 Jericho Turnpike.

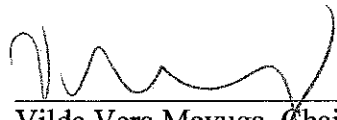
Service was proper. Appended to her reply, respondent provided affidavits of service stating that petitioner Terraferma and petitioner Blue Chip Fish & Clam Co. Inc. were each served by regular mail on August 13, 2014 at 2136 Jericho Turnpike, New Hyde Park, New York, 11040. Respondent represented that neither mailing was returned undeliverable. Once respondent produced the affidavits of service by the individual who did the mailing, petitioners’ statement of non-receipt is insufficient to overcome the presumption of proper mail service and due receipt (*Matter of Vadillo*, 15-367 at 1 [May 25, 2016]; *Matter of Astor*, PR 08-056 at 2 [March 24, 2010]). Petitioners do not dispute the facial validity of respondent’s affidavits of service. We therefore find that respondent properly served petitioners pursuant to Labor Law § 33, and, accordingly, the statute of limitations has run.

Petitioners have not established that the address to which the orders were served was not their place of business or that mailing the orders to that address was not reasonably calculated to give notice. Because the petition was filed late and service was proper, the Board lacks jurisdiction over this matter and the petition for review must be dismissed.

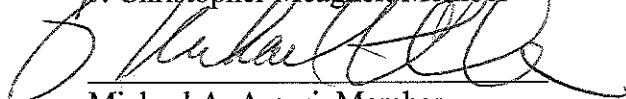
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

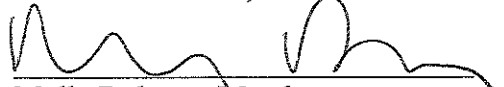
The Commissioner’s motion to dismiss the petition for review is granted, and the petition is dismissed.

Dated and signed by the Members of the Industrial Board of Appeals in New York, New York on March 1, 2017.


Vilda Vera Mayuga, Chairperson


J. Christopher Meagher, Member


Michael A. Arcuri, Member


Molly Doherty, Member


Gloribelle J. Perez, Member