STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: GREGORY G. KERBER and WURLD MEDIA, INC., Petitioners, To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 and an Order to Comply with Article 19 of the Labor Law, all dated September 25, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 08-170 INTERIM RESOLUTION OF DECISION

APPEARANCES

David L. Gruenberg, Esq., for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Jeffrey G. Shapiro of Counsel, for Respondent.

WHEREAS:

The Petition for review in the above-captioned case was filed with the Industrial Board of Appeals (Board) on November 24, 2008. The Petition seeks review of three Orders under the Labor Law that the Respondent Commissioner of Labor (Commissioner) issued against the Petitioners on September 25, 2008, finding the Petitioners in violation of Labor Law §§ 191, 198-c, 661, and 12 NYCRR 142-2.6. The first Order (Wage Order) finds that Petitioners failed to pay wages and directs payment of $31,320.60 in wages due and owing ($20,315.20 due to a named Claimant for the period May 14, 2006 through December 23, 2006, and $11,005.40 due to a second named Claimant for the period October 14, 2006 through January 6, 2007), together with interest in the amount of $10,042.95, and a civil penalty in the amount of $23,490.00, for a total amount due and owing of $64,853.55. The second Order (Wage Supplement Order) finds that Petitioners failed to pay wage supplements and directs payment of $1,249.25 in wage supplements due and owing for the period July 1, 2004 through December 16, 2006, together with interest in the amount of $430.97, and a civil

penalty of $937.00, for a total amount due and owing of $2,617.22. The third Order (Penalty Order) finds that Petitioners failed to keep and/or furnish true and accurate payroll records for each employee for the period May 14, 2006 through January 6, 2007.

The Petition does not dispute the findings that the Labor Law was violated by nonpayment of the sums found due and by failure to keep and/or furnish true and accurate payroll records, but raises four objections to the Orders. First, the Petition in paragraphs 2 and 4 alleges that the Orders must be vacated as to Petitioner Gregory G. Kerber, because he is not personally liable for the allegedly unpaid wages and wage supplements. Second, the Petition alleges in paragraph 3 that the Orders must be vacated because Petitioner Wurld Media, Inc. "did not have adequate funds" to pay Claimants' wages. Third, the Petition in paragraph 5 alleges that the Orders must be vacated because Kerber "filed a petition in the Bankruptcy Court for the Northern District of New York, pursuant to Chapter 13 of the Bankruptcy Laws," and the Commissioner and DOL "are required to follow the processes and procedures set forth in the bankruptcy proceeding by filing the appropriate claim in that Court," and "have failed to do so." Finally, the Petition in paragraph 6 alleges that the Orders must be vacated because Petitioner Wurld Media is incorporated in Delaware, and the obligations set forth in the Orders "cannot be made obligations of shareholders and officers of Delaware corporations."

On January 8, 2009, the Commissioner filed a motion to dismiss the Petition in its entirety pursuant to the Board's Rules of Procedure and Practice (Rules) 65.13(d)(1)(iii), asserting that "the allegations made in the Petition do not set forth grounds for a finding that the Orders at issue are invalid or unreasonable;" or in the alternative, to require Petitioners to file an Amended Petition. Petitioners did not oppose the motion.

The Board finds that three of the four allegations in the Petition do not set forth grounds on which relief may be granted. We therefore grant the Commissioner's motion to dismiss and strike the allegations in the Petition concerning Wurld Media's lack of funds to pay its workers; the failure to file a proof of claim in bankruptcy; and Wurld Media's incorporation in Delaware. The Board denies the Commissioner's motion with respect to Mr. Kerber's denial of personal liability.

At the outset, we note that a lack of adequate funds does not excuse a failure to comply with the law. The Petition does not deny that Claimants were not paid the wages and wage supplements that the Orders find are due and owing; it simply alleges that the corporation did not have adequate funds to pay. We find as a matter of law that this objection does not state a claim that the Orders under review are unreasonable or invalid.

With regard to the bankruptcy issue, Petitioners allege that the Commissioner failed to file a proof of claim in the Bankruptcy Court. The Commissioner moves to dismiss this allegation on the grounds that she "was not served with a Notice of Filing [of the bankruptcy petition] thereby notifying [her] of such a filing allowing for the filing of a Notice of Claim," and that review of the Bankruptcy Court's electronic records "indicates that Petitioner Kerber filed a Chapter 7 petition in the NDNY on June 9, 2008" while the "Orders being appealed from in the instant matter were not issued until September 2008; as such this argument has no relevance on the instant matter."

The Board grants the motion to dismiss this allegation without prejudice on grounds other than those raised by the Respondent, and strikes that part of the Petition that objects to the Orders because a proof of claim was not filed with the Bankruptcy Court. The Petitioners' theory appears to be that filing a bankruptcy petition stays the Commissioner from issuing Orders to Comply, but the recently decided case, *In Re: Jerome Pollock, Jr. Stone Artist, Inc.*, 402 BR 534 (Bktrcy NDNY 2009), involving the Commissioner's issuance of an Order for wages, holds that issuance of an Order to Comply after the filing of a bankruptcy petition is within the police power exception to the automatic stay provision of the Bankruptcy Code, 11 USC §362(b)(4), although actual collection of the amount found due must be in accordance with bankruptcy procedures.

The United States Bankruptcy Code at 11 USC §362(b)(4) states that a bankruptcy petition "does not operate as a stay... of the commencement or continuation of an action or proceeding by a governmental unit... to enforce such governmental unit's or organization's police and regulatory power." In *Jerome Pollock Stone Artist, supra*, the Commissioner issued an Order to Comply to a bankrupt employer, finding that the employer had failed to pay overtime. The employer argued that issuance of the order was barred by the bankruptcy stay, but the Bankruptcy Court found that regardless which of several legal tests was used, the "police power exception" allowed the Commissioner to issue the Order. *Jerome Pollock Stone Artist,* 402 BR at 536-538. The court noted that the Second Circuit has "held that the government is acting within its police or regulatory power up to the moment liability is 'definitively fixed by entry of judgment,'" *id.* at 538 (quoting *SEC v Brennan,* 230 F3d 65, 71 [2d Cir 2000]), and that:

> "The DOL is empowered by §218 of the New York State Labor Law to issue an Order to Comply to an employer who has violated the Labor Law and, pursuant to part three [of §218 of the Labor Law], may seek entry of judgment for damages and fines arising from said violations."

Id. at 538. *See also e.g., In re: Ngan Gung Restaurant, Inc.*, 183 BR 689, 691-3 (Bankr SDNY 1995) (similar result concerning Attorney General's enforcement of the Labor Law).

The court in *Jerome Pollock Stone Artist* found that:

> "Entry of the judgment will not give the government any priority over other creditors, it simply allows liquidation of the claim -- a task that ultimately must be completed in connection with Stone Artist's bankruptcy filing... Actual collection of the back pay and liquidated damages claims must proceed according to normal bankruptcy procedures."

Jerome Pollock Stone Artist, Id 402 BR at 537. The DOL is free to proceed "up to and including entry of a money judgment, but not including unilateral enforcement of such a judgment." *Id.* 402 BR at 535.

Thus, the automatic stay provision does not preclude the Board from deciding Petitioners' appeal. The automatic stay begins to apply only 60 days after the Board's

decision and only if there has been no proceeding for further administrative review or for judicial review and the Commissioner has filed the Order with the county clerk. Labor Law §102 provides that an aggrieved party must commence an Article 78 proceeding within 60 days after the Board's decision is issued. Labor Law §218(3) states:

> "Provided that no proceeding for administrative or judicial review as provided in this chapter shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the commissioner, or the decision of the industrial board of appeals containing the amount found to be due including the civil penalty, if any. The filing of such order or decision shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order or decision may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment."

Only "once liability is fixed and a money judgment has been entered" is the automatic stay triggered; that is, enforcement of the judgment and the actual collection of the liability must be effectuated through the bankruptcy court. *SEC v Brennan,* 230 F3d 65, 72-73.

Whether or not a proof of claim was filed with the Bankruptcy Court is not relevant in the instant case and is not germane to the reasonableness or validity of the Order. Under the Labor Law, the Board's role is to decide whether the Commissioner's order is unreasonable or invalid, not to rule on how it may be enforced. We therefore grant the motion to dismiss on this issue.

The Petitioners' claim that liability found in the Orders "cannot be made obligations of shareholders and officers of Delaware corporations" is also dismissed because it does not set forth grounds on which relief may be granted. Corporations that function as employers in New York are subject to New York law. The fact that the corporation is a Delaware corporation does not exempt it from New York law if it functions as a New York employer. "Employer" is defined by Article 6 as "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law §190[3]). The Orders found Kerber (as well as Wurld Media) to be "an Employer as defined in Section 190.3 of the New York State Labor Law," who employed Claimants, but failed to pay them and to keep required records.

At this juncture, we deny Respondent's motion to dismiss the claim that Petitioner Kerber does not have personal liability. The Petition alleges that although "Gregory G. Kerber was the CEO and Chairman of WurldMedia," he "did not have personal liability to pay the wages which are the subject of this order." We understand this to be a denial that, in his personal capacity, Kerber was an "employer" within the meaning of Labor Law §190(3). Based on our understanding, accepting all of the facts alleged in the Petition as true, and affording the Petitioners the benefits of every possible inference, as we must, *see Nathan Rosenblatt and Ashland Maintenance Corp. (T/A Ashar Cleaning Corp.)* Board Docket No. PR 07-103 (October 8, 2008), we find that the Petition sufficiently states a claim on which

relief can be granted. In *Franbilt, Inc. and/or Thomas J. Barnes and/or Michael J. Burns,* Board Docket No. PR 07-019 (January 28, 2008), the petition stated only that two Petitioners were not individually liable. As in the instant case, the Commissioner moved to dismiss on the basis that a bare assertion of no individual liability was a conclusion of law and fact which is improper under Rule 66.3(e). The Board rejected that argument and found that the petition contested the validity or reasonableness of the Order with respect to the inclusion of individual "employers" under Article 6 of the Labor Law. The claim of individual liability in the instant case is a particularly inappropriate subject for a motion to dismiss because its determination rests on facts not yet before the Board.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. Respondent's motion to dismiss is granted in part, and paragraphs 3, 5 and 6 and the claims stated therein are stricken from the Petition; and

2. Respondent's motion to dismiss the claims in paragraphs 2 and 4 of the Petition is denied, and these claims shall be processed in accordance with the Board's Rules of Procedure and Practice; and

3. Respondent shall serve and file an answer to the Petition as modified herein within 35 days of service of this Interim Resolution of Decision.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

ABSENT
LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
October 21, 2009.