

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of: :

ANGELO A. GAMBINO AND FRANCESCO A. :
GAMBINO (T/A GAMBINO MEAT MARKET, :
INC.), :

Petitioners, :

To Review Under Section 101 of the Labor Law: An :
Order to Comply with Article 19 of the Labor Law :
and An Order Under Article 19 of the Labor Law, :
both dated March 4, 2010, :

- against - :

THE COMMISSIONER OF LABOR, :

Respondent. :
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DOCKET NO. PR 10-150

INTERIM
RESOLUTION OF DECISION

APPEARANCES

Bosco Bisignano & Mascolo, Esqs. LLP, John Bosco of Counsel, for Petitioners.

Maria L. Colavito, Counsel, New York State Department of Labor, Larissa C. Wasyl of Counsel, for Respondent.

WHEREAS:

Respondent Commissioner of Labor (Commissioner) moves to dismiss the petition here on the grounds that it was untimely filed and fails to state a cause of action upon which relief may be granted. Petitioners cross move to dismiss the orders on review

STATEMENT OF THE CASE

The Commissioner issued an order to comply with Article 19 of the New York Labor Law (wage order) and an order under Article 19 of the New York Labor Law (penalty order) (together, orders), against Petitioners Angelo A. Gambino and Francesco A.

Gambino (T/A Gambino Brothers Meat Market, Inc.), dated March 4, 2010. Their petition was mailed on May 14, 2010 and received by the Board on May 17, 2010. The Board served the petition on the Commissioner, and her motion to dismiss, brought pursuant to Board Rules of Procedure and Practice (Rules) 65.13 (d) (1) (iii) (12 NYCRR 65.13 [d] [1] [iii]), followed.

Rule 65.13 (d) (1) (iii) states that “[w]ithin thirty (30) days after the receipt of a Petition, [the commissioner] may . . . move for an order dismissing the Petition where it appears that . . . the Petition fails to comply with the provisions of either Section 101 [of the Labor Law] or the board’s Rules.” The motion asserts that “Petitioners failed to comply with both statute and Board Rules by filing their petition with the Board more than 60 days after the issuance of the Order at issue [and] Petitioners also failed to state a cause of action in compliance with the Board’s Rules” Rule 66.3 (e) requires that the petition “state clearly and concisely the grounds on which the matter to be reviewed is alleged to be invalid or unreasonable”

The Petitioners oppose the motion on the ground that the orders were not properly served pursuant to Labor Law § 33. We agree and deny the Commissioner’s motion to dismiss.

Labor Law § 33 entitled “service of notice” states:

“Whenever the commissioner or board or any person affected by the provisions of this chapter is required to give notice in writing to any person, such notice may be given by mailing it in a letter addressed to such person at his last known place of business or by delivering it to him personally. Notice to a partnership may be given to any of the partners and notice to corporation may be given to any officer or agent thereof upon which summons may be served as provided by the civil practice laws and rules. Whenever an order or demand of the department is required to be served it shall be served in the manner hereinbefore provided for the service of a notice or by delivering it to any person of suitable age and discretion in charge of the premises affected by such order, or if no person is found in charge by affixing a copy thereof conspicuously upon the premises.”

The Commissioner issued the orders against Angelo A. Gambino and Francesco A. Gambino trading as Gambino Brothers Meat Market, Inc. after an investigation by the Department of Labor (DOL). Under Labor Law § 33, service of the orders could have been by mail to the Petitioners’ last known business address or by personal delivery to each of them anywhere within the relevant jurisdiction. However, the Commissioner chose to serve the orders by mail to the Petitioners’ home addresses which is not authorized by the statute and is therefore not proper service.

The Commissioner argues that proper service was accomplished because the Petitioners' home addresses were listed in the New York State Department of State Division of Corporations entity information database, and therefore those were the Petitioners' last known business addresses. We do not agree.

The Division of Corporations' information pertains to service on the corporate entity Gambino Brothers Meat Market, Inc., but the orders were not issued against that entity, only against the individuals who were trading as that corporate entity.

The parties' motion papers make clear that at the time the orders were issued in 2010, the corporate entity had already been dissolved for more than seven years. The Division of Corporations' information unequivocally states that Gambino Brothers Meat Market, Inc. was dissolved on September 25, 2002, and it is clear from the parties' papers that DOL knew that subsequent to the dissolution of the corporation, the Petitioners were operating their butcher shop at an address on 5th Avenue in Brooklyn, New York. DOL records indicate that the butcher shop was located at an address on 5th Avenue in Brooklyn, New York, and the orders themselves, covering a claim period subsequent to the dissolution of the corporation, are addressed to the Petitioners at a 5th Avenue, Brooklyn address.

Under such circumstances, Labor Law § 33 requires that the Petitioners be either personally served wherever they may be found within New York, or served by mail but only at their last known business address, which may have been the 5th Avenue address in Brooklyn that is referred to in the documents in DOL's file, but certainly was not the Petitioners' home addresses in Staten Island.¹ Accordingly, we find that mail service on the Petitioners at their homes and on their accountant, whom the Division of Corporations' information shows as authorized to receive service on behalf of Gambino Brothers Meat Market, Inc., did not effect service on the Petitioners.

In the absence of proper service on the Petitioners, the limitations period did not begin to run, and the petition is timely filed with the Board. We find that the petition and amended petition filed with the Board here are timely and that the Board's review proceedings have been commenced. (*cf. Matter of Paul Coppa and Ten's Cabaret, Inc.*, PR 08-072 [interim decision, March 25, 2009].)

The Commissioner also alleged that the petition should be dismissed because it does not state a cause of action. However, the petitioners requested leave from the Board to file an amended petition to cure any such defects, and the amended petition was filed on June 10, 2010, and adequately pleads the grounds that the orders are alleged to be invalid or unreasonable. Accordingly, the Commissioner's motion to dismiss is also denied with respect to the claim that the Petitioners have failed to state a cause of action upon which the Board may grant relief.

¹ The issue of whether at the time the orders issued the Petitioners continued to operate a business at their last known place of business was not directly dealt with by the parties on this motion. However, nothing in our decision should be construed to mean that Labor Law § 33 permits the Commissioner to serve an order by mail to a last known business address where such service is not reasonably calculated to give notice (*see e.g. McDonald v Ames Supply Co.*, 22 NY2d 111, 116 [1968]; *Fashion Page Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 272 [1980]).

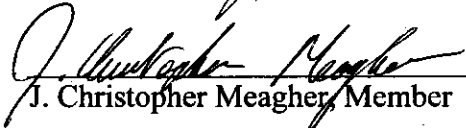
The Petitioners' cross-motion for the orders to be dismissed is denied because the orders are not a pleading that may be dismissed pursuant to Board Rules 65.13 (12 NYCRR 65.13).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent Commissioner of Labor's motion to dismiss the petition be, and hereby is, denied; and
2. The Petitioners' cross-motion to dismiss the orders be, and hereby is, denied; and
3. Respondent Commissioner of Labor be, and hereby is, required to answer the amended petition within 35 days of the service of this Interim Resolution of Decision upon her.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Jean Grumet, Member

Absent

LaMarr J. Jackson, Member

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
November 18, 2010.

The Petitioners' cross-motion for the orders to be dismissed is denied because the orders are not a pleading that may be dismissed pursuant to Board Rules 65.13 (12 NYCRR 65.13).

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent Commissioner of Labor's motion to dismiss the petition be, and hereby is, denied; and
2. The Petitioners' cross-motion to dismiss the orders be, and hereby is, denied; and
3. Respondent Commissioner of Labor be, and hereby is, required to answer the amended petition within 35 days of the service of this Interim Resolution of Decision upon her.

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