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In the Matter of

ALLEN P. THESIER AND LAUREL R. THESIER,

for a determination pursuant to Section 909 of the New York Labor Law that violations of Labor Law, Article 30 and/or Code Rule 56 took place as hereinafter described.

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REPORT
&
RECOMMENDATION

File No.: DSH - 0164006

Resolution Case No. 80127489

To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued by the Department of Labor on June 14, 2023, a videoconference hearing was held on September 19, 2023, in Albany, New York with participating parties and/or witnesses appearing remotely at various other locations. The purpose of the hearing was to provide all parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Asbestos Control Bureau (“Bureau”) of the Division of Safety and Health of the New York State Department of Labor (“Department”) into whether Allen P. Thesier and Laurel R. Thesier (“Respondents”) complied with the requirements of Article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR Part 56 when Respondents undertook an asbestos abatement project on a vacant residential property they owned located at: 156 Main Street, Esperance, New York, Asbestos Inspection Case Number: 26815236 (“Project”).

HEARING OFFICER

Marshall H. Day was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Department Deputy Commissioner and General Counsel, Jill Archambault (Debra Collura, Senior Attorney, of Counsel).

Respondent, Allen P. Thesier, appeared *pro se*.

PROCEDURE

The Parties were afforded the opportunity to submit Proposed Findings of Fact and Conclusions of Law. The Post-Hearing Submissions were originally due on December 29, 2023, however at the request of the Respondents, the time given for those submittals was extended until January 12, 2024.

ISSUES

1. Did Respondents violate any of the provisions of Labor Law Article 30 or of 12 NYCRR part 56 when they had the vacant residential structure located at 156 Main Street in Esperance, New York demolished, prior to obtaining the results of an asbestos survey?
2. Should a civil penalty be assessed, and if so, in what amount?

FINDINGS AND CONCLUSIONS

On June 14, 2023, the Department duly served a copy of the Notice of Hearing on Respondent by first class mail and by certified mail. Respondent signed a Return Receipt evidencing its receipt of the document. The Notice of Hearing scheduled September 19, 2023, and September 20, 2023 hearing dates, and required that the Respondent serve an Answer at least 14 days in advance of the scheduled hearing.

On or about, August 31, 2023, Respondents filled an Answer to the charges contained in the Notice of Hearing and appeared *pro se* at the hearing.

At the hearing, the Department produced sworn and credible evidence substantially supporting the Department's charges that Respondents violated the particular provision of the Labor Law or the Code Rule that are hereinafter particularized.

On August 29, 2022, the Code and Zoning Official for the Town of Esperance, received a report from the Mayor of the Village of Esperance, that a residential building located at 156 Main Street in the Town of Esperance, New York was allegedly breaking apart in an upper corner. On that same day that official made a site visit to that address, and after assessing and photographing the structure, he wrote an Order to Remedy Violation, which he served upon the owners of the vacant structure, the named Respondents herein.

The Order to Remedy Violation, put Respondents on notice that they were required to obtain the results of an asbestos survey before the building could be demolished. The order allowed for thirty days to get the asbestos survey completed, and to obtain the results of that survey¹.

On September 7, 2022, Respondents installed a safety fence in front of the structure to prevent anyone from getting too close to the building.

On September 7, 2022, Respondents signed a contract with Excellent Exterior and Deck Company, Inc. for the demolition of the vacant residence.

On September 8, 2022, the Code and Zoning Official told the Respondents that the building had not been condemned².

On September 9, 2022, an Inspection Service took bulk samples of possible asbestos containing material from the structure.

On September 9, 2022, on the same day the samples were taken, Respondents had the vacant residential structure demolished.

¹ The Code and Zoning Official testified that he gave Mr. Thesier thirty days to get the asbestos survey done, in the hopes that the asbestos would show the dwelling did not contain asbestos and no remediation of the residence would be necessary resulting in "tremendous cost-savings to him". He also testified that he thought a thirty-day window to get the survey and complete the demolition would be safe to work with without the building collapsing on its own.

² Not condemning the property gave the Respondents time to get the survey results back prior to demolition. Condemning the property would require the immediate need to hire a licensed asbestos contractor to demolish the property.

On September 9, 2022, the Code and Zoning Official was informed by the Mayor of the Village of Esperance and the Fire Chief that the structure at 156 Main Street, Esperance, New York was being demolished. Based on that information, the Code and Zoning Official prepared a new Order to Remedy Violation as well as a Stop Work Order which were served upon the Respondents by the Schoharie County Sheriff's Department.

On September 14, 2022, results of the asbestos survey indicated that the structure contains asbestos.

On October 6, 2022, the Code and Zoning Official reported to the New York State Department of Labor that a building had been demolished before the results of an asbestos survey was obtained.

On October 11, 2022, Department of Labor, Senior Safety and Health Inspector made a site visit to 156 Main Street, Esperance, New York where he met with the Code and Zoning Official.

The Senior Safety and Health Inspector observed debris from the demolished structure and issued a Stop Work Order.

On October 14, 2022, a Notice of Violation was issued to the Respondents for non-compliance with 12 NYCRR 56-5.1 (c), Building/Structure Demolition.

Pursuant to 12 NYCRR 56-5.1 (c), a building/structure shall be assumed to contain asbestos and shall be demolished per Industrial Code Rule Part 56 unless the building/structure was adequately certified to be free of asbestos containing material by a licensed asbestos contractor. Respondents, although well intentioned, did not follow the code rule and had the building demolished prior to receiving the results of the asbestos survey. That survey later revealed that the structure contains asbestos. Therefore, the demolition of the structure prior to receipt of the survey was in violation of Industrial Code Rule Part 56.

The Opening Statement, Closing Argument, and Post-Hearing Submission offered by Respondent ("Mr. Thesier") indicate that the Respondents believed they had a justifiable rationale for demolition of the property prior to receipt of the survey results (for the safety and welfare of the public) rather than their disregard for the regulations outlined in the code rules or the statutory requirements laid out in the Labor Law. Mr. Thesier was concerned the vacant structure maintained on the property he owned was going to collapse at any moment, and this collapse could cause harm to the surrounding properties and person's living in the immediate

community. Also, he believed that the amount of asbestos found in the demolished structure did not rise to the level where remediation would be required if in fact abatement needed to occur.

Mr. Thesier admitted on the record that the building was taken down before the results of the survey were complete. He believed he had a good faith rationale for demolishing the structure prior to the receiving the asbestos survey results, but he failed to take into effect the danger of exposure to the public of asbestos containing material that the disturbance may have caused when the unlicensed and uncertified asbestos contractor performed the demolition of the structure.

Additionally, Respondents argued that the demolished building was a residential dwelling not subject to the code rules. Pursuant to 12 NYCRR 56-1.3 (a), the Industrial Code Rule Part 56 shall not apply to an asbestos project of an owner-occupied single-family dwelling, where the owner performs the work. The facts of this case indicate that the demolition occurred on a vacant residential building, which was not the owner's primary residence at the time of demolition (Mr. Thesier testified he lived in an adjacent property). Also, although Mr. Thesier was on the site during the demolition, he hired a private unlicensed asbestos abatement contractor to perform the work prior to receiving the results of the survey. Accordingly, this residential structure falls under the code rules and is subject to the regulations described therein.

Although the Respondents clearly violated the Code Rule particularized herein, and that violation as serious as it is, involves the potential exposure to the public to asbestos containing material. The Respondents are not asbestos contractors. They are residential property owners who have no history of prior violations of 12 NYCRR part 56. It appears from the record that the Respondent attempted to cooperate with the various authorities involved in the remediation of the property and even though they failed to act as instructed by those various authorities by waiting for the asbestos survey results, they felt the structure was a danger to the public and surrounding community and needed to be demolished right away. Under the circumstances of this case, although the Bureau requests the assessment of a \$3,000.00 penalty for the single violation, a penalty of \$1,500.00 for the violation is appropriate and should be imposed.

Finally, during the course of the hearing, Respondents moved to dismiss the Department's allegations, arguing that the Department had failed to sufficiently prove that they violated the regulations. Given the extensive testimony elicited concerning the violation and the

documents received into evidence on behalf of the Department, I find no basis for granting such a motion.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the record created at the hearing, and upon the sworn testimonial and documentary evidence adduced at hearing from the parties, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DENY the Respondents Motions to Dismiss; and

DETERMINE that Respondents committed one violation of 12 NYCRR 56-5.1 (c) Building/Structure Demolition - Unidentified and Unassessed Asbestos, for failing to secure the requisite survey prior to the Respondents demolishing a vacant residential structure.

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1) (b), Respondents be assessed a civil penalty of \$1,500.00 for this single violation.

ORDER that Respondent immediately remit payment to the Division of Safety & Health, Asbestos Control Bureau, State Office Building Campus, Building 12, Room 157, Albany, NY 12226 of the total amount due (\$1,500.00), made payable to the Commissioner of Labor, for the one violation of 12 NYCRR Part 56 that is subject of the within proceeding.

Dated: February 16, 2024
Albany, New York

Respectfully submitted,



Marshall H. Day
Chief Administrative Law Judge