

Petitioner, the Department of Buildings (DOB), appeals from a recommended decision and order dismissing a violation of Section 28-211.1 of the Administrative Code of the City of New York (Code) alleging that Respondent, a licensed professional engineer (PE), made a material false statement in construction plans he filed with DOB. In the notice of violation (NOV), dated September 8, 2014 the issuing officer (IO) affirmed the following:

Based on an audit failure of professionally certified alteration II application No. 320892263, Respondent (applicant of record) submitted amended drawings to the Department auditor on 9/8/14 which showed the existing elevation of the subject premises to be 3 stories. Based on an inspection by Inspector Martin Steigman on 9/25/14, the existing elevation of the building at the subject premises is 4 stories. Therefore, the amended drawings submitted by the Respondent on 9/8/14 contain a material false statement.

### **The hearing**

At the hearing, Respondent testified as follows. He filed the initial plans to renovate the premises in February 2014, having inspected it before filing the plans. His inspection revealed the premises to be a three-story wood frame building. The DOB plan examiner disapproved the plans, reporting his objections in an “Audit for Professionally Certified Applications” dated June 19, 2014 and subsequently updated. Respondent addressed all objections in amended plans filed with DOB on September 8, 2014. He did not have to re-visit the site to do so because the premises owner provided him with an updated professional architectural survey, dated July 22, 2014. The updated survey provided proof of compliance with egress and other requirements that gave rise to the objections. It also confirmed that the premises had three stories. Respondent therefore did not know or have reason to believe that the premises changed from three to four stories after his onsite February 2014 inspection. Furthermore, neither the contractor nor the owner advised him that they were adding a fourth story; he only became aware of it after receiving the NOV. Respondent’s attorney contended that Petitioner presented no evidence showing when the fourth story was added and suggested that it might well have been after the September 8<sup>th</sup> filing of the amended plans.

The hearing officer credited Respondent’s testimony. In dismissing the NOV, he concluded that Respondent reasonably relied on the updated survey made less than seven weeks before he filed the amended plans on September 8, 2014 and that he had no duty to re-inspect the property at that time. He further concluded that Petitioner presented no evidence that the building was four stories when Respondent filed the amended plans.

### **The issue**

The issue on appeal is whether Petitioner’s evidence established that Respondent knew or should have known at the time of filing that the amended plans falsely described the premises as having three stories.

## **Applicable law**

Code Section 28-211.1 provides:

It shall be unlawful for any person to make a material false statement in any certificate, professional certification, form, signed statement, application, report or certification of the correction of a violation required under the provisions of this code or any rule of any agency promulgated thereunder that such person *knew or should have known to be false*. [Emphasis added.]

## **The appeal**

On appeal, Petitioner's attorney argues as follows. Respondent should have verified information he relied on in filing the amended plans with DOB; as a licensed professional he was responsible for submitting materially accurate information and documents. Respondent's reliance on the updated survey is not a defense under the "known or should have known" standard imposed by Code Section 28-211.1. That standard, which exists to allow certain professionals to "self-certify" filings to ensure fair dealings and code compliance, requires a P.E. to verify representations made in applications, plans, and other filings with DOB. Petitioner does not have the burden of proving that the fourth story had been constructed before the September 8<sup>th</sup> filing; Respondent should have presented evidence that the fourth floor was constructed without his knowledge after the September 8<sup>th</sup> filing.

Petitioner's attorney further claims that the plan examiner's objections on June 19, August 3, and September 4, 2014 called into question the height of the building, yet Respondent saw no need to personally confirm its height, and the July 22<sup>nd</sup> updated survey was incomplete evidence because an additional survey with the same date showed the premises as three and one-half stories.

Answering the appeal, Respondent's attorney argues as follows. Petitioner's case assumes the fourth story existed prior to September 8, 2014 and that Respondent knew it existed on that date and yet still submitted amended plans to DOB identifying the premises as three-stories. Contrary to Petitioner's contentions, the only time the plan examiner questioned the height of the building was when an HPD record was identified which listed the building as having two stories. Agreeing that listing was incorrect, Respondent and the plan examiner resolved the objection. Petitioner failed to produce any evidence of the existence of a fourth story on September 8, 2014. As it may well have been erected between September 8<sup>th</sup> and September 25<sup>th</sup>, Respondent's submission on September 8<sup>th</sup> contained no false statement. Respondent had no duty to re-inspect the premises after his initial inspection. The plan examiner's objections had nothing to do with the addition of a story which would prompt a need for Respondent to return to the premises and re-draw plans. Respondent properly relied on the licensed land surveyor, an expert specifically trained in that field. Respondent credibly testified that he did not know when the fourth story was added and was never told of it by either the owner or contractor.

Finally, Respondent's attorney objects to Petitioner's reference, for the first time on appeal, to the survey that describes the premises as having three and one-half stories; had it been raised at the hearing, he asserts, Respondent would have readily explained that he knew of this survey and was advised by the building owner that the error was later corrected by the surveyor.

## **The Board's determination**

The Board denies the appeal.

### ***Evidence did not show Respondent knew or should have known of fourth story***

The IO's allegations of material misstatements are based on his inspection of the premises 17 days after Respondent's filing of amended plans. However, no evidence establishes that on the date of filing, September 8, 2014, Respondent knew or should have known that the premises had been increased from three to four stories or even that an extra story had been added. Respondent filed the initial plans on an Alteration 2 project in February 2014 to resolve an ECB violation for work without a permit.<sup>1</sup> His inspection prior to drawing up the plans and filing them with DOB revealed the premises to be a three-story building. The plans were disapproved on June 19, 2014. Nevertheless, contrary to Petitioner's attorney's contentions, none of the objections in the plan examiner's report and updates concerned the building's height or otherwise required Respondent to re-inspect it and substantially revise the plans. In preparing the amended plans, Respondent reviewed an updated professional survey sent to him by the building owner, which showed no change in the height. The Board agrees with the hearing officer that Respondent reasonably relied on the survey and had no duty as a PE to conduct an additional physical re-inspection of the premises. On this record, the Board finds no credible evidence that at the time of submission of the amended plans, Respondent knew or should have known that the building had four stories.

Accordingly, the recommended decision and order is affirmed.

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<sup>1</sup> That NOV, issued to the building owner for performing work without a permit, required the restoration of a building observed to have illegal SROs to a legally approved three-family residence.