

The City of New York:
Department of Consumer Affairs

-----X
In the Matter of the Notice of Hearing
For Unlicensed Activity of,

Best Buy Stores LP,

Respondent.
-----X

Cert No. 1052328

Judge Thomas P. Coyne

MEMORANDUM OF LAW

Simmons, Jannace & Stagg, L.L.P.
Attorneys for Defendant
Best Buy Store LP
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Syosset, New York 11791
(516) 357-8100

Submitted by: Adam M. Levy, Esq.

The City of New York:
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Respondent Best Buy Stores LP, by its attorneys Simmons, Jannace & Stagg, LLP, submit this post-hearing memorandum of law pursuant to 6 RCNY § 6-37 in further support of its defense to the Department of Consumer Affairs ("DCA") Notice of Hearing For Unlicensed Activity dated July 21, 2008, heard before Judge Thomas P. Coyne on August 12, 2008.

Preliminary Statement

The DCA claims Best Buy violated New York City Administrative Code § 20-387 by offering to sell home theater installation services. The claim is in direct opposition to the DCA's legal opinion and established case law.

As we discuss below, the DCA's Office of the General Counsel expressly represented that installers of home stereo and video equipment do not require home improvement licenses. See Ex. "A". Indeed, the definition of "home improvement" does not even include installations of stereo and video equipment.

Moreover, the New York County Supreme Court has expressly held that installers of stereo and video equipment do not require home improvement licenses. Therefore, according to the statute, the DCA's own interpretation of the statute, and the Supreme Court's interpretation of the statute, the installation of a home theater, which is to say the installation of stereo and video equipment, does not constitute a home improvement.

As such, Best Buy did not violate § 20-387 by offering to sell home theater installation services without a home improvement license and this action must be dismissed.

For the DCA to now claim that Best Buy violated the statute by offering to install home theaters is not only meritless, it is disingenuous. The DCA's attempt to circumvent its previously stated position and the intent of the statute by arguing that Best Buy requires a license to install speakers and run their wires behind sheetrock walls is unavailing. Merely removing small sections of sheetrock without otherwise affecting the structure or integrity of a home is insufficient to constitute an "alteration" or "renovation" as it is defined in the statute. As such, the DCA's argument should be disregarded.

Argument

"Home Improvement" is defined as follows:

"...the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house. 'Home improvement' shall not include (i) the construction of a new home or building or work done by a contractor in compliance with a guarantee of completion of a new building project, (ii) the sale of goods or materials by a seller who neither arranges to perform nor performs directly or indirectly any work or labor in connection with the installation of or application of the goods or materials, (iii) residences owned by or controlled by the state or any municipal subdivision thereof, or (iv) painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined. Without regard to the extent of affixation, 'home improvement' shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems."

NYC Admin. Code 20-386(2).

As set forth, although the installation of central air conditioning systems, storm windows, awnings, etc., are expressly included in the definition of home improvement, the installation of home theater systems and/or other stereo and video equipment is not. Therefore, it must be presumed that the legislature did not intend to regulate these types of installations. See Campagna v. Shaffer, 73 N.Y.2d 237, 538 N.Y.S.2d 933 (agencies cannot regulate activities beyond the specific grants of authority conferred by the legislature).

Indeed, the New York County Supreme Court employed this reasoning to hold that installers of stereo and video equipment do not require home improvement licenses. See Innovative Audio Video Showrooms Inc. v. Friedman, 7 Misc.3d 383, 789 N.Y.S.2d 417 (Sup. Ct. New York County 2005). In so holding, the court cited to the DCA's own interpretation of the statute. Id. at 387, fn. 3. See DCA response to inquiry regarding whether installers of audio and video equipment require home improvement licenses, dated October 5, 2004, attached as Ex. "A".

Like the plaintiff in Innovative, Best Buy installs home stereo and video equipment. As expressed at the August 12, 2008 hearing, a typical installation includes screwing brackets onto a wall to mount a flat screen television, connecting speaker and other component wire to the television and programming the settings of the television to ensure it functions properly. Nevertheless, the DCA took issue with the fact that during some installations, Best Buy: (i) cuts and removes small portions of sheet rock to imbed speakers into a wall; and (ii) drills small holes in sheetrock to conceal speaker wires.

The DCA's charge is misplaced because a home improvement license is not required for "every change" in a structure. Power Cooling, Inc. v. Wassong, 5 Misc.3d

22, 24, 783 N.Y.S.2d 741, 742 (App. Term 1st Dep't 2004). See also Joblon v. Solow, 91 N.Y.2d 457, 464, 672 N.Y.S.2d 286, 290 (1988) (interpreting the analogous Labor Law § 240(1) and expressing concern for allowing "every change" in a structure to qualify as an alteration). Minor changes to a wall, such as those contemplated here, are not significant enough to constitute an "alteration" or "renovation" as it is defined in the statute. See Innovative, 7 Misc.3d 386-387, 789 N.Y.S.2d at 419 (merely installing speaker wire into walls does not constitute a home improvement). Despite research, we failed to locate any legal authority holding that merely cutting and removing small sections of sheetrock is a "home improvement."

Moreover, the First Department's Appellate Term, in citing to Innovative with approval, cautioned against interpreting the home improvement statute too broadly. See Precision Mirrors & Glass v. Dicostanzo, 17 Misc.3d 30, 844 N.Y.S.2d 568 (App. Term 1st Dep't 2007). The court was unwilling to hold as a matter of law that installing four air conditioning units through walls, capping existing pipes and walls and performing exterior stone masonry, constituted a "home improvement." Power Cooling, 5 Misc.3d at 24-25, 783 N.Y.S.2d at 743. The court also cited to Coggeshall Painting & Restoration Co. v. Zetlin, N.Y.L.J. May 25, 1999 at 26, col 1 (App. Term 1st Dep't), aff'd, 282 AD2d 364 (1st Dept 2001), for the proposition that "limited carpentry" and tile work is not regulated by the statute.

As in Power Cooling and Coggeshall Painting, Best Buy's practice of making limited alterations to small sections of sheetrock to imbed speakers and run speaker wire behind a wall is far too insignificant to fall within the definition of the statute. To require Best Buy to obtain a home improvement license for these purposes would be to rule in

contravention to established precedent and in complete disregard of the cautions expressed by the Appellate Term and the Court of Appeals. As such, Best Buy does not require a home improvement license to install home theaters and as such, did not violate § 20-387.

Conclusion

For the foregoing reasons, this action should be dismissed.

Dated: Syosset, New York
August 19, 2008

Yours, etc.,

Simmons, Jannace & Stagg, L.L.P.

By: _____


Adam M. Levy

Attorneys for Defendant
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75 Jackson Avenue
Syosset, New York 11791-3139
(516) 357-8100

Correspondence Routing Sheet

DCA Control Number: 15745	Control Date: 10/4/04	F Number: EMAIL-MAY
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Document Information

From: Gary J. Wachtel	Subject: Request for Legal Assistance
Title:	
From office of:	Type: Email-Mayor
Date: 10/ 4/04	Agency:

Routing Information

Route To: Susan Kassapian
Unit: Counsel's Office
Action Required: Take appropriate action, report to Commissioner
Date Due: 10/11/04

Comments

Sent to Legal-MF

Response

DCA Action:

Acknowledgement Date: 10/ 4/04

The above correspondence has been handled by our unit as assigned unless indicated below. Please de-control the item in your tracking system. Thank You.

Name	Date	Telephone #	Signature

Please return completed form to Commissioner's Office. Thank you.

From: crmrepl@customerservice.nyc.gov
Sent: Wednesday, September 29, 2004 10:46 AM
To: DCAMail; Csmith1@cityhall.nyc.gov
Subject: City of New York - Correspondence #1-1-125874104 Message to Commissioner, DCA - Home Improvement Contracting

*Re-route to DCA: Please Process

Your City of New York - CRM Correspondence Number is 1-1-125874104
DATE RECEIVED: 08/13/2004 10:39:54
DATE DUE: 08/26/2004
SOURCE: WEB

The e-mail message below was submitted to the City of New York via NYC.gov or the 311 Call Center. It is forwarded to your agency by the Mayor's Office of Operations. In accordance with the Citywide Customer Service standard, your response is due in 10 business days.

If this message is to a Commissioner / Agency Head and needs to be re-routed to another agency or cc to another agency, forward the email to outgoingagency@customerservice.nyc.gov. Do not make any changes to the subject line. Include any comments and it will be processed by The Mayor's Office of Operations.

All other web forms are to be handled by the receiving agency.

-----Original Message-----

From: PortalAdmin@doitt.nyc.gov
Sent: 08/13/2004 10:39:45
To: sbladmp@customerservice.nyc.gov
Subject: < No Subject >

From: info@garywachtel.com (Gary Wachtel)
Subject: Message to Commissioner, DCA

Below is the result of your feedback form. It was submitted by Gary Wachtel (info@garywachtel.com) on Friday, August 13, 2004 at 10:39:45

This form resides at
<http://www.ci.nyc.ny.us/html/mail/html/maildca.html>

Message Type: Request for Information

Topic: Home Improvement Contracting

Contact Info: Yes

Middle Name: J

Last Name: Wachtel

Street Address: 545 Madison Avenue

Address Number: 703

City: New York

State: NY

Postal Code: 10022

Country: United States

Work Phone #: 212 371-6500

Email Address: info@garywachtel.com

Message: Does a store in NYC that sells and installs stereo and video equipment in apts. need a home improvement license?

REMOTE_HOST: 162.83.197.180

HTTP_USER_AGENT: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1; .NET CLR 1.1.4322)



The New York City
Department of
Consumer Affairs
42 Broadway
New York, NY
10004-1716

Gretchen Dykstra
Commissioner

212.487.4342
summerst@dca.nyc.gov

October 5, 2004

Re Home improvement license
Lic _____

Dear: Consumer

In answer to your request for information:

- This business is currently licensed. This business was licensed on the date or during the period you specified (_____).
- This business is not licensed/failed to renew license/licensee alert. Out of Business. No record license pending.
- This business category is not licensed by Consumer Affairs. Please contact the following NYC or NY State agency: _____

Other No you do not need a home improvement license.

- A computer print-out is attached.
- Enclosed is a complaint form in case you wish to file one against this business.

Sincerely,

(Signature)
Tammy M. Summers
Office of the General Counsel
(212)487-4342

INQUIRY DESK
Tel. (212) 487-4342 ■ Fax (212) 487-4390
summerst@dca.nyc.gov

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS
42 Broadway
New York, New York 10004



Gary J. Wachel
545 Madison Avenue Apt.703
New York, NY 10022

10022+3244 33



**AFFIDAVIT OF SERVICE
VIA OVERNIGHT DELIVERY SERVICE**

**Re: In the Matter of the Notice of Hearing
for Unlicensed Activity of Best Buy Stores LP
Cert No. 1052328**

STATE OF NEW YORK)
 : ss.:
COUNTY OF NASSAU)

Margaret M. Rose, being duly sworn, deposes and says:

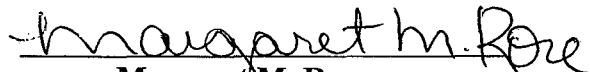
I am not a party to the within action, am over 18 years of age and reside in Farmingdale, New York.

On August 19, 2008, I served the within **MEMORANDUM OF LAW** by depositing a true copy thereof, enclosed in a wrapper as addressed below, into the custody of DHL Express for delivery on Wednesday, August 20, 2008 by 12:00 p.m., prior to the latest time designated by that service for such delivery.

Judge Thomas P. Coyne
Administrative Law Judge
Department of Consumer Affairs
66 John Street, 11th Floor
New York, NY 10038

Inspector Valentino
Enforcement Unit
Department of Consumer Affairs
66 John Street
New York, New York 10038

Graciela Torres
Settlement Officer
Adjudication Division
The New York City
Department of
Consumer Affairs
66 John Street
New York, New York 10038


Margaret M. Rose

Sworn to before me this
19th day of August, 2008.


NOTARY PUBLIC

**JOSEPHINE RISELVATO
Notary Public, State of New York
No. 01R16169418
Qualified in Suffolk County
Commission Expires June 25, 2011**