Retek v City of New York
2003 NY Slip Op 30018(U)
September 17, 2003
Supreme Court, Kings County
Docket Number: 0008327/3272
Judge: Lawrence S. Knipel
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At an IAS Term, Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of September, **2003**

PRESENT:

HON. LAWRENCE S. KNIPEL,

Justice.

- -X

ABRAHAM RETEK,

Petitioner,

\- against -

Index No. 8327/03

THE CITY OF NEW YORK, et al.,

Respondents.

- -X

The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

This is a proceeding by petitioner, Abraham Retek, to vacate and discharge a lien dated December 31, 2002, filed by respondent Division of Enforcement Services of the Department of Housing Preservation and Development of the City of New York (DHPD), upon certain real property owned by him for the amount unpaid to DHPD for relocation

expenses in the sum of $77,240.67,[1] incurred by it from April 19, 2001 through July 2, 2002. Respondents the City of New York and DHPD cross-move to dismiss the petition.

Petitioner is the owner of an apartment building, located at 107 Lynch Street, in Brooklyn, New York. On April 10, 2001, the New York City Department of Buildings (the DOB) issued a peremptory vacate order, directing that "all persons occupying any part or parts of the structure located at 107 Lynch Street vacate [the entire building]." The vacate order stated that it "[wa]s issued because there [wa]s an imminent danger to the safety and li[ves] of the occupants, in that [the] entire building [wa]s in danger of imminent collapsing [because the] floors [we]re weak pitched and sagging." It noted that "[p]artial collapse ha[d] already occurred at [the] rear," and required the building to "remain vacant and unoccupied until such time as [it wa]s declared safe by the [DOB]." Pursuant to Administrative Code of the City of New York § 26-127 (e) (ii), a copy of this order was filed with the Clerk of this court. In addition, a copy of the order was posted at the entrance to the premises, and another copy was mailed to petitioner.

Administrative Code § 26-301 (1) (a) (v) mandates that DHPD provide and maintain tenant relocation services "for tenants of any privately owned building where the displacement of such tenants results from the enforcement of any law, regulation, order or requirement pertaining to the maintenance or operation of such building or the health, safety and welfare of its occupants." Such relocation services "consist of such activities as [the

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[1] **By letter dated July 11, 2003, respondents state, *inter alia,* that due to an "accounting error," the amount of the lien was actually $53,150.67.**

DHPD commissioner] may deem necessary, useful or appropriate for the relocation of such tenants" (Administrative Code § 26-301 [1] [a] [v]). Pursuant to the authority granted to it by Administrative Code § 26-301 (1) (c), DHPD has promulgated rules, detailing the types of relocation services it has deemed necessary (**see** Rules of City of NY [28 RCNY] § 18-01 et ***seq.***). Under these rules, DHPD, "[u]pon receiving notice of a Vacate Order, . . . [is required to] offer temporary shelter to [the] relocatee" and after doing so, it must "pay temporary shelter benefits" (28 RCNY § 18-01 [b] [3]).

On April 12,2001, two days after the issuance of the April 10,2001 vacate order, Estella Martines, who was the tenant who executed the lease for apartment No. 1 of the subject building, along with her husband, her five children, and her mother-in-law, who resided with her in the apartment, registered with DHPD's Emergency Housing Services Bureau for emergency relocation services to place them in alternate housing. On the same day, Alejandra Tucker, who was the tenant who executed the lease for apartment No. 3 of the subject building, along with her two children, her brother, her uncle, and her cousin, who resided with her in the apartment, also registered with DHPD's Emergency Housing Services Bureau for emergency relocation services to place them in alternate housing. On April 12, 2001, DHPD placed both Estella Martines and her family and Alejandra Tucker and her family in an emergency shelter maintained by the Red Cross, where they remained until DHPD found them alternate housing at the Amboy Family Center in Brooklyn, New York. DHPD moved the Tucker family to the Amboy Family Center on April 19,2001 and they

remained there until July 2,2002. DHPD moved the Martines family to the Amboy Family Center on June 12,2001 and they remained there until January 21,2002.

Administrative Code § 26-305 (1) provides:

> "Whenever [DHPD] has incurred expenses in providing relocation services for tenants pursuant to subparagraph (v) of paragraph (a) of subdivision one of section 26-301, . . . [DHPD] shall be entitled to reimbursement of such expenses from the owner of the building from which such tenants were relocated, if the conditions giving rise to the need for such relocation arose as a result of the negligent or intentional acts of such owner, or as a result of his or her failure to maintain such dwelling in accordance with the standards prescribed by the housing or health code governing such dwelling."

Administrative Code § 26-305 (4) states that "[t]o the extent that such expenses are not recovered by [DHPD], they shall, except as herein provided, constitute a lien or liens upon such building and the lot upon which it stands, governed by the provisions of law regulating mechanics' liens."

DYPD filed a notice of lien dated December 31,2002 against petitioner's property. The notice of lien specifies that the property is subject to a $77,240.67 lien for the unpaid amount of the total relocation costs and expenses incurred by DHPD from April 19, 2001 until July 2,2002 for the relocation services provided to the tenants of the property. These total relocation costs of $77,240.67 are set forth as consisting of total hotel expenses of $75,927 and a total administration cost of $1,313.67. It is disputed that the notice of lien complied with the requirements of Lien Law § 9, and that DHPD served petitioner with the notice of lien in compliance with Lien Law § 11, and duly filed proof of service.

Subsequently, petitioner, by notice of petition and petition, brought the instant application to vacate DHPD's notice of lien, and respondents have cross-moved to dismiss the petition.

Petitioner, in support of his instant application, initially contends that pursuant to Administrative Code § 26-305 (3), DHPD was required to first bring an action against him for recovery of relocation expenses and, only if such expenses were not recovered following that action, could it file a lien against his premises. This contention is without merit. Administrative Code § 26-305 (3) merely provides that DHPD ***"may*** bring an action against the owner for the recovery of such expenses" (emphasis added). It expressly states, however, that "[t]he institution of such action shall not suspend or bar the right to pursue any other remedy provided by this section or any other law for the recovery of such expenses" (Administrative Code § 26-305 [3]). Indeed, it was specifically held in ***Matter of Gibor Associates*** v ***City of New York*** (91 Misc 2d 915,917) that bringing an action "is not the sole remedy available" to DHPD since Administrative Code §26-305 **(4)** "also authorizes the filing of a notice of lien." That court ruled that "[t]here was no merit to [the] contention [of the petitioner therein] that th[is] code section only authorizes filing of a lien for the amount not recovered after entry of judgment" ***(id.)***. It noted that DHPD was "furnished with alternate remedies" ***(id.)***.

Petitioner further contends that he is entitled to a summary discharge of the lien pursuant to Lien Law § **19** (6). Lien Law § **19** (6) permits the discharge of a lien "[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed." While, as

respondents contend, petitioner's notice of petition is not formally denominated as a Notice of Application to Discharge Mechanic's Lien, and petitioner did not designate his application as one pursuant to Lien Law § 19 (6) summarily discharging of record the December 31, 2002 notice of lien filed by DHPD (**see** West's McKinney's Forms § 7:84), the notice of petition seeks an order vacating, canceling, and discharging of record the December 31, 2002 notice of lien upon the ground that the notice of lien is defective, not proper, and/or not valid pursuant to Administrative Code §§ 26-301 and 26-305. The notice of petition is accompanied by the petition, which specifies the defects claimed. Thus, the relief sought by petitioner is evident from the notice of petition and the petition. Therefore, since "the form of the action or proceeding is neither dispositive nor controlling," and a court may "convert it into the appropriate action or proceeding and decide the matter," the court may construe petitioner's application as one brought pursuant to Lien Law § 19 (6) (***Matter of Gibor Assocs.,*** 91 Misc 2d at 916; ***see also*** CPLR 103 [c]).

In seeking a discharge of the lien pursuant to Lien Law § 19 (6), petitioner contends that DHPD has no valid lien based upon the ground that the notice of lien includes items that are not properly lienable by reason of their character. Specifically, petitioner argues that pursuant to Administrative Code §§ 26-301 and 26-305, DHPD may not recover relocation expenses for anyone other than a "tenant," and that, therefore, it was improper for it to assert a lien for relocation expenses for anyone other than the two tenants who executed the leases (i.e., Estella Martines and Alejandra Tucker).

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This argument is rejected. Initially, it is noted that the subject leases expressly permit the spouse and children of the party executing the lease to use the apartment. Furthermore, while the Administrative Code does not define the term "tenant," § 18-01 (a) of Chapter 18 of Title 28 of the Rules of the City of New York defines a "relocatee" for whom relocation services are to be provided pursuant to Administrative Code § 26-301 as "an individual or a head of household and his/her family, deprived of a permanent residence rented by him/her to them in the City of New York as a direct result of the enforcement of a Vacate Order." In addition, "family" is defined therein as including "those persons who permanently resided with a head of household at the time the Vacate Order was issued" (28 RCNY § 18-01 [a]). It has been held that "[t]he definition [of relocatee] set forth in this rule, adopted by the agency responsible for the administration of the statute, should be followed as it is not irrational or unreasonable" (***City of New York v New York & Hong Kong Reciprocation Exchange Corp.***, 193 Misc 2d 716,720).

Here, Estella Martines and Alejandra Tucker were the heads of household in the two apartments in the subject premises at the time the April 10,2001 vacate order was issued, and DHPD has submitted evidentiary proof that the other individuals who resided with them were all family members who permanently resided with them. Thus, it appears that all of these individuals relocated from the subject premises meet the definition in 28 RCNY §18-01 (a) of "relocatee," and are encompassed in the term "tenant" under Administrative Code §§ 26-301 and 26-305.

Petitioner further argues that rent does not constitute a relocation expense which may be properly recovered by DHPD pursuant to Administrative Code § 26-305. In support of this argument, petitioner relies upon Administrative Code § 26-305 (2), which states that "[t]he [relocation] expenses incurred for which payment to [DHPD] is due under the provisions of this section shall include but not be limited to departmental costs, bonuses, moving expenses or other reasonable allowances given to induce tenants to relocate voluntarily." Petitioner contends that the listing of certain expenses while omitting rent from this list necessarily implies a statutory intent to exclude rent as an expense for which DHPD may assert a lien.

Petitioner's contention is without merit. Administrative Code § 26-305 (2), by its express terms, is not an exhaustive list, but explicitly states that the relocation expenses shall "not be limited to" the mentioned items. Significantly, as noted above, DHPD is required under RCNY § 18-01 (b), which was promulgated under Administrative Code § 26-301 (1) (c), to offer temporary shelter, and Administrative Code § 26-305 permits DHPD to recover the expenses incurred by it under Administrative Code § 26-301. Moreover, the Report of the Committee on General Welfare, written in favor of approving and adopting Local Law 15 of 1965 (the Local Law that added Administrative Code § 26-305 [formerly § 1160-5.0]), specifically states that relocation costs paid to tenants for which a lien may be asserted include the costs of "[e]mergency housing . . . [w]here a vacate order has been issued . . . by the Buildings . . . Department [ ]." Therefore, it is apparent that reimbursement for rent is contemplated by Administrative Code § 26-305 (2) as a recoverable expense for which

DHPD may properly assert a lien. Petitioner's reliance upon other statutes, which he alleges are analogous, is misplaced since these statutes are not applicable here, and there is specific indication of the intent of Administrative Code § 26-305, as expressed by the Report of the Committee on General Welfare.

Petitioner also argues that the lien should be vacated because the amount of rent paid for the relocation of the tenants was unreasonable. Such argument is unavailing. DHPD is required to "pay the actual cost of temporary shelter up to $12 per day for one adult and $7 per day for each additional person residing with the relocatee" (28 RCNY § 18-01 [b], [c]). Additionally, "if suitable shelter is unavailable for these amounts, DHPD may pay such additional sums as are necessary to obtain suitable shelter for the relocatee" (28 RCNY § 18-01 [c]). DHPD's records reflect that in this case, suitable shelter for the relocatees was obtained by paying $16 per day for the two heads of household and $11 per day for the other relocatees." It cannot be said that such costs were unreasonable as a matter of law, and, so long as the amount stated is not grossly exaggerated, a lien is not void if the stated amount is inaccurate *(see **Goldberger-Raabin, Inc. v 74 Second Ave. Corp.**,* 252 NY 336, 342-343). Furthermore, the issue of the reasonableness of these costs, based upon the costs per day or the length of time for which they were incurred, are appropriately reserved for trial in an action to foreclose the lien; such issue may not be resolved upon a summary application ***(see Aaron v Great Bay Contracting,*** 290 AD2d 326, 326; ***Care Systems v Laramee,*** 155 AD2d 770, 771; ***Dember Constr. Corp. v P&R Elec. Corp.,*** 76 AD2d 540, 546; ***Matter of Supreme Plumbing Co. v Seadco Bldg. Corp.,*** 224 App Div 844, 844).

Petitioner further argues that the lien is invalid because DHPD has not demonstrated that the conditions giving rise to the need for the tenants' relocation arose as a result of the DOB's April 10,2001 vacate order, as required by Administrative Code § 26-305 (1). While petitioner does not dispute the existence or validity of the vacate order, he asserts that DHPD has failed to show that the tenants were served or notified of this vacate order or that they had vacated in response to it. He states that Alejandra Tucker vacated and surrendered apartment No. 3 on April 16,2001, and that Estella Martines vacated and surrendered apartment No. 1 on December 8,2001 and were, therefore, no longer his tenants.

Petitioner's argument is rejected. Petitioner does not dispute that a copy of the April 10,2001 vacate order was posted at the entrance to the premises, and that the tenants could no longer remain in the premises following the issuance of the vacate order. It is also undisputed that Estella Martines and Alejandra Tucker did not terminate their tenancies prior to the time that they and their families applied for DHPD emergency relocation services, and, thus, they were tenants when the need for relocation arose. Moreover, petitioner has failed to proffer any other reason whatsoever why Estella Martines, Alejandra Tucker, and their families would have vacated the subject premises in the middle of their leases and applied to DHPD for relocation services two days after the issuance of the DOB's vacate order.

Petitioner, in support of his application, also relies upon the case of ***Matter of Toolsee v Department of Housing Preservation and Development of the City of New York*** (299 AD2d 209). His argues that pursuant to the holding in ***Matter of Toolsee*** (299 AD2d at 211),

DHPD, as the lien holder, has the burden of proof with regard to the validity of the lien, and that DHPD has failed to meet this burden.

Petitioner's reliance upon ***Matter of Toolsee*** (299 AD2d at 211) is misplaced. The Appellate Division, First Department, in ***Matter of Toolsee*** (299 AD2d at 211), merely held that "[a]s with any other lien, [D]HPD, as the lien holder, has the burden of proof as to its own entitlement to the lien and as to the lien's validity." The petitioner-landlords in ***Matter of Toolsee*** (299 AD2d at 210), in alleging that the lien's validity had not been established, pointed out that they had commenced eviction proceedings for nonpayment of rent against the tenants therein pursuant to a notice of eviction served on the tenants more than a month before the vacate order was issued by DHPD. There was also no evidence in the record that any of the tenants were ever notified of the vacate order and the petitioners themselves claimed that they were unaware of the vacate order until they received DHPD's response to their petition to vacate the notice of lien ***(id.*** at 212). DHPD had failed to provide any evidentiary support that the tenants therein had vacated their apartments due to the vacate order, as opposed to vacating as a result of the eviction proceeding for nonpayment of rent ***(id.).*** Thus, the Appellate Division, First Department, in ***Matter of Toolsee*** (299 AD2d at 212), found that since it could not be said that the displacement of such tenants resulted from the vacate order, which was fundamental to a determination of the lien's validity under Administrative Code §§ 26-301 (1) and 26-305, the lien was not facially valid.

The facts of this case are easily distinguishable from those in ***Matter of Toolsee*** (299 AD2d at 210-212). In contrast to the situation presented in ***Matter of Toolsee*** (299 AD2d at

212), here, as discussed above, DHPD has established that the conditions giving rise to the tenants' relocation arose as a result of the DOB's April 10, 2001 vacate order. DHPD has also demonstrated that, contrary to petitioner's arguments, the individuals relocated were "tenants" of petitioner's buildings within the meaning of Administrative Code § 26-305, that the replacement housing costs are a recoverable relocation expense under Administrative Code § 26-305 (1), and that the amount of the replacement housing costs asserted was not facially unreasonable. Therefore, DHPD has satisfied its burden of proof with regard to the validity of its lien (*see* Lien Law § 19 [6]).

Accordingly, respondents' cross motion is granted, and the petition is dismissed.

This constitutes the decision, order, and judgment of the court.

ENTER,