

Matter of Ali v New York City Dept. of Hous. Preserv. & Dev.
2007 NY Slip Op 31341(U)
May 14, 2007
Supreme Court, Queens County
Docket Number: 0020333/2006
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 2

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In the Matter of the Application of		INDEX NO. 20333/06
AHZAD ALI,		MOTION SEQ. NO. 1
Petitioner,		DATED: 5/14/07
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,		BY: WEISS, J.
-against-		
NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,		
Respondent.		
	x	

In this Article 78 proceeding, petitioner Ahzad Ali seeks a judgment vacating and setting aside the determination of respondent New York City Department of Department of Housing Preservation and Development (HPD) dated June 9, 2006, which denied his protest of a lead paint abatement bill in the sum of \$3,461.84, and in the alternative for a judgment reducing the amount charged to petitioner or remanding the matter to the agency for an administrative hearing.

Petitioner Ahzad Ali is the owner of real property located at 196-24 90th Avenue, Jamaica, New York. On September 7, 2005 the New York City Department of Health and Mental Hygiene (DOH) received a complaint from Bibi Noomen, the tenant in apartment "PVT" on the first floor of the subject premises,

concerning dangerous lead paint conditions in the apartment, including peeling paint on the window frames. Ms. Noomen resided in this apartment with her two children, who were then under the age of six. On September 8, 2005 the DOH inspected the apartment and determined that it contained lead based paint with a concentration of lead equal to or greater than 1.0 milligrams of lead per square centimeter and that the paint was peeling on one or more window friction surfaces or other additional surfaces that were determined to be a lead hazard due to the condition, location and accessibility to children. The DOH, in a letter dated September 14, 2005, ordered the petitioner to abate the lead paint condition and to submit to the DOH, within five days of completing all abatement work, copies of dust clearance test results. Petitioner states that he entered into contracts with JD Lead Consultants and Enviro-Probe, and that on September 19, 2005 he hand delivered to the DOH a Notification of Commencement of Lead Abatement. On September 22, 2005 the DOH inspected the subject apartment and determined that some, but not all, of the lead paint conditions had been corrected. Petitioner states that on October 10, 2005, he received reports from JD Lead Consultants indicating that the lead paint hazard in the subject apartment was below the permissible level established by the NYC Lead Poisoning Prevention Program, and that he forwarded these reports along with other documents to the DOH on October 19, 2005 by certified mail.

Petitioner states that before the DOH received this information, it conducted an inspection on October 13, 2005, and determined that the lead paint conditions were not fully corrected. On October 19, 2005 the DOH conducted another inspection of the apartment, determined that the lead paint conditions were still not fully corrected, and issued a Notice of Violation for the failure to comply with the September 8, 2005 order to abate the lead paint conditions.

On November 1, 2005, the DOH reported to HPD that the subject apartment still had dangerous lead paint conditions, and requested that it perform emergency repairs to the apartment. On November 7, 2005, HPD inspected the apartment in order to determine the amount of work to be performed. On December 12, 2005, the HPD filed a Notification of Commencement of Lead Abatement with the DOH, which indicated that Linear Environmental Corporation (Linear) was the contractor for the emergency repairs at the apartment. On December 19 and 20, 2005, Linear inspected the apartment, and commenced the emergency repairs on December 21, 2005. The abatement work continued until December 23, 2005, when the petitioner ordered Linear to stop the work. Linear had performed 80 percent of the repairs, at a cost of \$2,909.00. On February 23, 2006, HPD requested that the DOH conduct an inspection of the apartment. On February 24, 2006, the Department of Finance sent

petitioner a bill for \$3,232.90, which included the cost of repairs, taxes and fees.

Petitioner, in a letter dated March 6, 2006 and received by HPD on March 10, 2005, stated that he was protesting the charges set forth in the Department of Finance bill, and requested a meeting or a hearing. In a letter dated March 17, 2006, HPD sent petitioner copies of Linear's invoices for the emergency repairs. On April 4, 2006, the DOH inspected the subject apartment and determined that petitioner had failed to adequately perform a clearance dust wipe test pursuant to the abatement order of September 14, 2005, and issued a Notice of Violation. On May 17, 2006, the DOH sent a letter to petitioner indicating that it had received acceptable dust wipe clearance test results. HPD, in a letter dated June 9, 2006, denied the petitioner's protest, and upheld the charges imposed for the set up fee, and work performed by Linear.

Petitioner thereafter commenced this proceeding and seeks a judgment vacating and setting aside respondent's determination of June 9, 2006, and in the alternative a judgment reducing the amount charged to petitioner or remanding the matter to the agency of an administrative hearing. Petitioner asserts that respondent's denial of its protest was arbitrary and capricious, and contrary to law. Petitioner claims that he performed and completed all necessary repairs and lead abatement on September 25, 2005, that

dust wipe samples were collected on October 6, 2005 and were analyzed by Enviro-Probe, Inc., who found that the level of lead was below the permissible level established by the NYC Lead Poisoning Prevention Program. Petitioner asserts that the dispatching of the agency's contractors to inspect and perform work at the subject apartment violated section 27-2127(b) of the Administrative Code, that HPD's contractors performed work that was unnecessary and not required under the agency's order, and contests the two bills from HPD, in the amount of \$226.14 and \$3,461.04, totaling \$3,461.04. Finally, petitioner states that a tax lien has been filed against his property in the sum of \$3,517.27.

Respondent HPD, in opposition, asserts that its determination to uphold the emergency repair lien was neither arbitrary nor capricious and has a rational basis in the law and the record. It is asserted that HPD has the authority to correct lead paint violations and to impose a lien for such costs, pursuant to section 27-2128 of the Administrative Code of the City of New York. It is further asserted that after petitioner was ordered to correct the unsafe lead paint conditions, he had ample time to do so, and failed to fully correct the condition. Respondent asserts that petitioner was properly notified that on November 1, 2005, that due to his failure to correct the condition, the DOH was requesting that HPD abate the lead paint conditions, and that the

agency's performance of emergency repairs would result in the placement of a lien on the subject property.

Petitioner, in his reply, states that he attended a proceeding in Civil Court, Queens County, regarding the Notice of Violation, and that on August 23, 2006, a default judgment and penalty were vacated. The Civil Court stated, in pertinent part, that the respondent Mr. Ali "submitted a report from a lead wipe sample result which is dated October 7, 2006 (sic) which were collected by JD Lead Consultants. Respondent submitted a Certified mail receipt which indicated that the test was mailed to the Department of Health on October 19, 2006 (sic). Therefore resp. has complied with the Order dated September 14, 2005. Resp. should go to the Department of Health to make sure that they received the test results." Petitioner asserts that at the time of that hearing, the City asserted that it had not received proof of the owner's completion of the work, and had already sent the contractors to do the abatement. Petitioner asserts that he never received the DOH's November 1, 2005 "Final Notice" which stated that the inspection of October 19, 2005 indicated that the condition had not been corrected and requested the HPD to execute the order. Petitioner reiterates his claim that the DOH and HPD improperly sent the contractor to his property, and that the work performed by the contractor was unnecessary and that the contractor absconded with several of his Tiffany style windows.

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law, and is neither arbitrary nor capricious (see Scherbyn v Wayne-Finger Lakes Board, 77 NY2d 753, 758 [1991]; Matter of Pell v Board of Educ., 34 NY2d 222, 230-231 [1974]; Westmoreland Apt. Corp. v N.Y. City Water Bd., 294 AD2d 587, 588 [2002]). The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Ostrer v Schenck, 41 NY2d 782, 786 [1977]; see also Pell v Board of Education, 34 NY2d 222, 231 [1974]). A "court may not overturn an agency's decision merely because it would have reached a contrary conclusion" (Sullivan County Harness Racing Association, Inc. v Glasser, 30 NY2d 269, 278 [1972]). The sole issue here is whether, on this record, respondent's decision was arbitrary and capricious.

The Housing Maintenance Code requires owners of residential buildings to keep their building in good repair and to comply with all Code requirements (Administrative Code of the City of New York, § 27-2005). Where a violation has been issued for a lead paint hazard, HPD is authorized to correct the violation, when the property owner fails to timely or properly correct the violation (see Administrative Code of the City of New York, §§ 27-2115, 27-2125, 27-2128). Here, it is undisputed that the subject premises contained unsafe lead paint conditions and that

the DOH, pursuant to 24 RCNY § 173.13 ordered petitioner to correct these conditions on September 14, 2005. Although petitioner claims that the dust wipe results establish that the lead paint condition had been abated by October 10, 2005 and that he sent the wipe test results to the DOH on October 19, 2005, the DOH's inspections of October 13 and 19, 2005 revealed that not all of the conditions had been corrected at that time. The fact that the dust wipe tests showed acceptable levels speaks to the adequacy of the clean up, but not to the proper correction of the lead paint violation. Housing Maintenance Code § 27-2115(1)(5) requires both an inspection to verify that the violation was corrected, and dust clearance test results before lead-based paint violation can be removed from HPD records. Therefore, it is evident that dust clearance testing is an additional requirement and it does not represent proof that the violation was corrected (see Department of Housing Preservation and Development of the City of New York v 712 Realty LLC a/k/a 712 Realty and Morris Lieberman, 14 Misc 3d 1240A [2007]).

The DOH issued the Notice of Violation on October 19, 2005 and on November 1, 2005 directed HPD to correct the violation. Contrary to petitioner's assertions, Section 27-2127 of the Administrative Code merely provides that "[t]he department may elect to proceed to take action to correct violations under this article pursuant to a prior court order," but does not require

either HPD or the DOH to obtain a court order in order to perform the abatement work.

HPD is entitled to recover the expenses it incurred for the lead paint abatement (Administrative Code of the City of New York § § 27-2128, 27-2129). To the extent that petitioner asserts that the work performed by HPD's contractor was unnecessary, and that the contractor's charges were excessive, petitioner failed to properly raise these issues before the agency. Petitioner, in his letter of March 6, 2006, stated that he was "protesting all charges for the above work claimed to be done" and requested that the charges be dismissed or that he be given a fair hearing. Petitioner, however, failed to state any basis for his protest and did not submit any documentary evidence in support of the protest. The court, therefore, finds that HPD's denial of the protest of the charges imposed for the costs incurred in the lead paint abatement at the subject premises was neither arbitrary nor capricious, is supported by the evidence in the record, and has a reasonable basis in the law.

In view of the foregoing, petitioner's request to vacate respondent's determination of June 9, 2006, and for alternative relief, is denied and the petition is dismissed.

Settle judgment.

J.S.C.