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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART 5

Gerald Fail

INDEX NO. 111513/07

MOTION DATE

- v -

Andrew Cuomo, as Attorney General of the State of New York and 219 West 81ST LLC.

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: February 8, 2008

EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the Application of
GERALD FEIL
Petitioner,

Index No.
111513/07

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,
- against -

DECISION
and ORDER

ANDREW M. CUOMO, as ATTORNEY GENERAL
of the STATE of NEW YORK and 219 WEST 81st LLC,
Respondents.

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HON. EILEEN A. RAKOWER

Petitioner moved into 219 West 81st Street (the building), penthouse A (the apartment), in May, 1963. The one bedroom, rent stabilized apartment has roof access and views that overlook the neighborhoods to the East and to the South. In May, 2006, respondent 219 West 81st Street LLC. (219), submitted an offering plan to respondent Andrew Cuomo, as Attorney General of the State of New York, (the AG) for the AG's consideration, hoping to obtain permission to convert the building to condominium ownership status. Petitioner maintains that there are material misrepresentations in the offering plan and the sponsor's accompanying certification. Petitioner cites specifically to the listed purchase price for the apartment and a paragraph in Schedule A of the offering plan as examples of such misrepresentations.

The purchase price for the apartment is listed as $2,090,000 during the "exclusive period" during which tenants may purchase their apartments. The paragraph entitled "Exclusive Right to Purchase" states, in relevant part:

> Each Eligible Tenant who occupies a Residential Unit in the Building on the date the Plan is accepted for filing, will, during the Exclusive Purchase Period, have the exclusive right to purchase his Residential Unit at the Purchase Price for such Residential Unit set forth in Schedule A.

However, petitioner notes that the offering plan also states:

> The Penthouse Units are currently occupied as residential apartments contrary to the Building's certificate of occupancy, which permits occupancy only by employees of tenants of the building.
>
> . . .
>
> Consequently, Sponsor will not offer any Penthouse Unit for sale unless and until it amends the certificate of occupancy to legalize such Penthouse Unit and files an amendment to the Plan offering such Penthouse Unit for sale.
>
> . . .
>
> During the Exclusive Purchase Period, each Eligible Tenant of a Penthouse Unit shall have an exclusive right, instead of purchasing his Penthouse Unit, to purchase one of certain vacant Residential Units for the Insider Price set forth in column number 6 of Schedule A.

Petitioner maintains that his apartment is a legal unit that he should be entitled to purchase. He provides a certificate of occupancy dated November, 1955 which lists the Penthouse story of the building as consisting of "Two (2) apartments and fifteen (15) maids' rooms." Petitioner notes that, over the years, there has been significant construction work of the other "penthouse structures" to convert them to residential apartments. He claims that when he first moved into the apartment, the then owner of the building told him that his apartment was, pursuant to the certificate of occupancy, a legal residence.

If petitioner is not going to be permitted to purchase his apartment, he wants the AG's acceptance of the offering plan vacated. He files this Article 78 proceeding seeking an order from the court vacating the decision of the A.G. and declaring its decision to accept the offering plan of respondent 219 to convert its rental apartments to condominiums, arbitrary and capricious and in violation of the law.

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the

court has no alternative but must confirm the determination.(*Matter of Pell v.Board of Educ.*, 34 NY2d 222. (1974)). The determination must be supported by substantial evidence, based on the record on a whole. (*Purdy v. Kreisberg*, 47 NY2d 354, (1979)). Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*300 Gramatan Ave. Assoc. v. State Div. Of Human Rights*, 45 NY2d 176, (1978)).

Petitioner argues that the A.G. violated The Martin Act, Article 23-A, General Business Law (GBL) section 352-e(1)(b) by accepting 219's offering plan for condominium conversion because the plan misrepresented the terms of the transaction. He maintains that his apartment is one of the two legal apartments mentioned in the 1955 certificate of occupancy and, therefore, he should be permitted to purchase it. He states that in lieu of being permitted to purchase his apartment, 219 has offered to permit him to purchase Unit 5H at an insider's price, as an "Exchange Unit." Petitioner argues that Unit 5H is not comparable to his apartment because it is smaller and has limited views.

Respondents argue that they have complied with the law and petitioner's remedy of requiring the A.G. to reject the offering plan is both too drastic and unwarranted. 219 states that other tenants of the building, along with outsiders, have signed purchase contracts and they would be adversely affected if the court were to grant petitioner's application.

The A.G. argues that the offering plan, as originally submitted and described in the petition before the court, was not approved by its office. It submits the affirmation of Susan M. Scharbach, the Assistant Attorney General assigned to review the offering plan, in support of is contention the petitioner's application should be denied. The affirmation states that the original offering plan has been amended a number of times since it was first submitted to the A.G.. In its present form, it is rational, in accordance with the law and its approval is not arbitrary, capricious, nor an abuse of discretion.

The A.G.'s affirmation recounts the numerous steps it has taken to assure that the offering plan that was finally approved is in accordance with the law. The A.G. agrees with petitioner that the original offering plan was deficient as it pertains to the apartment. The A.G. points to paragraph 10 in the original offering which described the penthouse units as a "special risk." Paragraph 10 states, in relevant part:

> The Penthouse Units are currently occupied as residential apartments contrary to the Building's current certificate of occupancy, which permits occupancy only by employees of tenants in the Building. As such, a Purchaser who purchases a Penthouse Unit will not be able to reside in the Penthouse Unit legally unless he amends the certificate of occupancy of the building to provide for residential occupancy by persons other than employees of tenants of the Building.. . Sponsor makes no representation or warranty as to whether any such Purchaser will be successful in effectuating any such amendment.

The A.G. argues that it did not violate The Martin Act because the purpose of Article 23-A is to ensure that the disclosure purposes of the statute are met. It argues that GBL §352-e(4) specifically states that the filing of an offering with the A.G.'s office "does not constitute approval of the issue or the sale thereof by . . . the attorney general of this state." Additionally, the Martin Act does not require the A.G. to investigate such filings because they are meant for informational purposes. (*Matter of Whalen v. Lefkowitz,* 36 NY2d 75 [1975]).

The A.G. explains that the filing begins a review process. After such a filing, the A.G. may respond with a letter outlining any deficiencies it perceives in the offering. Here, in a letter dated October 31, 2006, among other deficiencies, the A.G. required the sponsors to revisit paragraph 10 of the "special risks" section of the offering, noting that they must

> address this unusual provision to make the penthouse purchasers responsible for legalizing their units and amending the certificate of occupancy more completely. State the number of such units, how this may be accomplished, the time and cost involved, case law in this area, etc. Isn't sponsor amending the C/O to change the number of units? Provide a complete discussion of this in the Description of Property in Part I.

The A.G. states that it's long standing policy in cases where the certificate of occupancy does not reflect legal occupancy of a particular apartment has been to require the sponsor to either take all steps necessary to legalize the apartment or offer the tenant a comparable unit pursuant to the offering plan. The A.G. notes that the 219

sponsors were apprised of this requirement on numerous occasions.

The A.G. states that, although it has attempted to ascertain which of the apartments on the penthouse story are the "two apartments" referred to in the certificate of occupancy, it has been unable to do so. Architect Richard A. Daley, who works for the A.G., has provided an affirmation which states that he has examined Department of Buildings records, Department of Housing Preservation and Development records and plans of the layout of the penthouse apartments, as provided in the offering plan but his findings were inconclusive regarding which of the seven apartments on the Penthouse story are the two mentioned in the certificate of occupancy. However, Daley does state that he believes that petitioner's apartment, among others, appears "to be legalizable as laid out." Daley notes that any final determination regarding legalization would rest with the Department of Buildings.

Thereafter, the fifth amendment to the offering plan was filed and on April 24, 2007, the A.G. accepted it. Paragraph three of the fifth amendment states, in relevant part:

> Legalization and Offer of Penthouse Units. Despite Sponsor's representatives having examined the records . . . Sponsor has been unable to determine which of the Penthouse Units are the two apartments that can be legally occupied pursuant to the certificate of occupancy. Sponsor will apply to obtain from HPD a "Certificate of No Harassment," which is a prerequisite for amending the certificate of occupancy.
>
> . . .
>
> The Attorney General's office has assured Sponsor that it will assist Sponsor in attempting to expedite the processing of the application for a Certificate of No Harassment. Upon obtaining a Certificate of No Harassment, Sponsor will expeditiously submit requisite plans to the New York City Department of Buildings to amend the certificate of occupancy to provide for residential occupancy of the Penthouse Units currently occupied as residences.. ..Sponsor shall not be required to incur costs in excess of $375,000 in the aggregate . . . in obtaining such an amended certificate of occupancy. Sponsor's architect

> estimates that the maximum cost required to legalize such Penthouse units would be approximately $180,000. Therefore, Sponsor is providing for an estimate of 108% above this cost, recognizing inflationary factors. Although as previously stated in the Plan, Sponsor does not know whether or not it will be possible to effectuate such an amendment to the certificate of occupancy . . .

The fifth amendment continues stating that if the amendment to the certificate of occupancy is achieved, the offering plan will be amended so petitioner, along with the other Penthouse Unit residents, will be able to legally buy their apartments.

In his reply brief, petitioner acknowledges that the filing of the fifth amendment cures the deficiencies in the offering plan. However, petitioner states that it fails to address the critical deficiency of "a tenant's unqualified right by regulation to purchase [his] apartment." (Emphasis added.) He argues that there should not be a limited sum of money that the sponsors must spend to amend the certificate of occupancy because the prerequisite of obtaining a Certificate of No Harassment is not a simple procedure and it does not appear to him to be included in the legalization cost estimates. Additionally, petitioner speculates that the certificate of occupancy may need to be amended with respect to apartments on lower floors, as well as his.

Petitioner notes that "all bona fide tenants in occupancy on the date that the plan is accepted for filing . . . [have] the exclusive right to purchase their dwelling units for ninety days after the plan is presented." (13 NYCRR § 23.3(n)(1)(i)(a); GBL § 352-e(2)(d)(ix)). However, contrary to petitioner's claim that his right to purchase his apartment is "unqualified," part of being a bona fide tenant is the requirement that the tenant live in an apartment that is recognized by the Department of Buildings as a legal dwelling.

Petitioner's averment that the former owner told him that his apartment is legal is hearsay and insufficient to prove that it is one of the apartments mentioned in the certificate of occupancy. Therefore, neither he, respondent 219 nor respondent A.G. is able to prove that petitioner's apartment was one of the two referred to in the 1955 certificate of occupancy. Irrespective of whatever alterations and renovations a former owner may have done to convert penthouse spaces to apartments, if the apartment cannot be legalized, petitioner has no more right to live there as a rental tenant than as an owner. Additionally, petitioner does not appear to understand that

the decision as to whether to amend the certificate of occupancy and recognize the apartment as legal is exclusively within the purview of the Department of Buildings.

An administrative agency is entitled to great deference in matters within its authority and area of expertise. (*Academic Health Professionals Insurance Association v. M.Q. of New York, Inc.*, 30 AD3d 195 [1st Dept. 2006]). Here, 219's offering plan went through numerous revisions over the course of nearly one year before it was accepted by the A.G.. The A.G. followed its "longstanding practice" to require the sponsor of a building in which tenants reside in areas that do not provide for legal occupancy to either "undertake all steps necessary to legalize the unit or ofeer thr tenant a comparable unit pursuant to the offering plan." Under the circumstances presented here, it cannot be said that decision of the A.G. to accept the offering plan of respondent 219 to convert its rental units to condominiums is arbitrary and capricious or in violation of the law.

Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: February 8, 2008

EILEEN A. RAKOWER, J.S.C.