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

PRESENT: HON. LEWIS BART STONE Justice

PART 50 S

Sherwood Associates

-v-

DHCR

INDEX NO. 115961/07

MOTION DATE

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the annexed Decision and Order

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE

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

Dated: 19 November 2008

HON. LEWIS BART STONE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK: PART 50S

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In the Matter of the Application of :
SHERWOOD 34 ASSOCIATES,

:

Plaintiffs,

:

FOR A JUDGMENT PURSUANT TO ARTICLE 78 : DECISION AND
OF THE CIVIL PRACTICE LAW AND RULES : ORDER

-against- : INDEX NUMBER
115961/07

NEW YORK STATE DIVISION OF HOUSING AND :
COMMUNITY RENEWAL,

:

Respondent,

STEVEN KOBRICK AND GARY SCHWEDOCK, :

Intervenor-Respondents.

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Hon. Lewis Bart Stone,

This proceeding was commenced by Sherwood 34 Associates ("Sherwood") pursuant to Civil Practice Law and Rules ("CPLR") Article 78 against Respondent, New York State Division of Housing and Community Renewal ("DHCR") by Notice of Petition dated November 30, 2007, to annul and set aside a decision of DHCR, dated October 4, 2007 (the "Determination") which denied Sherwood's Petition for Administrative Review ("PAR"), dated December 7, 2000, on the grounds that the Decision was arbitrary and capricious and was made in violation of lawful procedure.

The PAR confirmed a ruling of the DHCR Rent Administrator ("RA") that Sherwood's building located at 447 Tenth Avenue, New York, N.Y. (the "Building") was part of a Horizontal Multiple Dwelling ("HMD"). Either of such grounds, if established, provide a sufficient basis under CPLR § 7803 for the grant of the relief sought.

On January 18, 2008, by stipulation of Sherwood and DHCR, the initial parties to this proceeding, Steven Kobrick and Gary Sherwood (the "Tenants") who were tenants of the apartment on the fourth floor of the Building (the "Apartment") were permitted to intervene in this proceeding, the time for DHCR to submit its response was extended, and the return date of the proceeding was adjourned to March 18, 2008. After all parties had submitted affidavits and briefs, the Court held a hearing and argument and requested that the parties submit, if they wished, additional material on such issues. The final submission was complete on June 2, 2008, rendering this matter ready for resolution.

The underlying issue in contention is whether two adjacent buildings owned by Sherwood since April 1985, respectively the Building and a second building located at 500 W. 35th Street in New York, N.Y. (the "Other Building"), constitute an HMD within the meaning of the Rent Stabilization Law (New York City Administrative Code §§25-504) ("RSL") and the Emergency Tenant Protection Act

of 1974 (L.1974, C.576) ("ETPA"). The Building has less that six residential units, but if Sherwood's two buildings constitute an HMD, the sum of the residential units in both exceed the threshold for regulation under the RSL and the ETPL; if the two do not constitute a HMD, neither the RSL nor the ETPA apply to residential units in the Building.[1] The Building is a four story building with commercial tenants on the first and second floors and a residential apartment on the third and on the fourth floors. The third floor is vacant and there is a single apartment, the Apartment, on the fourth floor. The Tenants, who rented the Apartment from a prior owner of the Building, occupy the fourth floor. The Building and the Other Building were respectively built in 1871 and 1866 by separate builders for separate owners who separately owned such buildings until 1954 whey the buildings came under the joint ownership of Sherwood's predecessor who had purchased the buildings from their prior owners at different times. The buildings were constructed in different designs and have different heights, architectural features, layouts and certificates of occupancy and multiple dwelling registrations. Since 1954, the buildings have remained in single ownership, have been jointly managed, and some building systems have been modified from time to time to serve both buildings.

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[1] Both the RSL and ETPA apply only to multiple dwellings containing six or more residential units.

Under the Rent Stabilization Code §2520.11(d), separate buildings may be found to be HMD's, subjecting apartments therein to the RSL, if the aggregate number of apartments is six or more. Such section provides:

> "A building shall be deemed to contain six or more housing accommodations if it was part of a multiple family garden-type maisonette dwelling complex containing six or more housing accommodations having common facilities such as a sewer line, water main or heating plant and was operated as a unit under common ownership on the date the building or complex first became subject to the RSL, notwithstanding that Certificates of Occupancy were issued for portions thereof as one or two-family dwellings."

Although this provision seems by its terms to limit itself to what were known as "garden apartments," DHCR has extended the concept and the courts have accepted such extensions to other buildings. Substantial litigation has ensued as to what jointly owned buildings, not clearly a "multiple family garden-type maisonette dwelling complex," were and were not subject to regulation under this standard, and many courts have addressed the parsing of the findings of DHCR in this area. DHCR has not issued regulations to clarify this area and there is no provision of the RSL which requires them to do so. Instead, DHCR has decided cases in this area on the fact patterns of the individual situations and DHCR and the courts have developed a jurisprudence to determine whether a particular determination of HMD status was correct.

In situations clearly not a "garden-type maisonette dwelling complex," a determination of HMD status requires three steps: First, as of when is the determination to be made, second, what are the facts showing commonality and what are the facts showing independence, and third, based on the precedents, do the commonality factors or their lack support a finding of HMD status. The first and third aspects are matter of law; the second is a matter of fact. However the facts are determined, DHCR must apply the law to such facts in making its determination. Whatever is DHCR's determination, a party aggrieved may seek review under CPLR Article 78, and that has occurred here following DHCR's determination that the two buildings are a HMD. The result is of enormous economic consequence to both Sherwood and the Tenants who have now been embroiled in litigating (along with DHCR) this issue for twenty three years through a number of DHCR procedures and various rulings of courts including a decision by the Appellate Division, First Department. Because of this convoluted past, where prior court decisions resolving aspects of this dispute may or may not constitute express precedent, law of the case or res judicata, the Court will set forth the history of this case, summarizing the record of this proceeding which constitutes almost six feet of documents.

In 1985, Sherwood's predecessor commenced a proceeding before DHCR to declare that the Building was not subject to the RSL as it was not part of an HMD. The Tenants opposed such proceeding. Eventually, by Order dated February 13, 1987, the RA determined the building was part of an HMD. The RA's order in such proceeding made no factual findings. Sherwood's predecessor did not file a PAR to challenge such order.

During the same period, Steven Trieber ("Trieber"), another residential tenant of the Building, filed a rent overcharge proceeding with DHCR. In such proceeding the RA in its order dated September 23, 1988, found that the Building was not part of a HMD and was thus not subject to the RSL. Trieber filed a PAR, claiming that it was. Sherwood opposed such PAR. During the pendency of such PAR, Sherwood commenced an ejectment action in Supreme Court in which Trieber cited the RA's February 13, 1987 determination that the Building was part of an HMD and Sherwood cited the subsequent September 23, 1988 RA decision that it was not. On August 11, 1989, Justice Brown of the Supreme Court indicated his confusion between the two DHCR orders, finding it was unclear whether the orders were revocable or just inconsistent. In any event, Trieber abandoned his PAR, and the RA's finding became final.

To resolve the conflicting and confusing orders, on August 18, 2000, Sherwood applied to DHCR for a determination whether the Building was subject to the RSL, submitting factual material to support its claim of non-applicability. DHCR denied such application on the grounds that its order of February 13, 1987 was res judicata and that laches prevented any assertion to the contrary. Sherwood commenced an Article 78 proceeding in Supreme Court to review this determination and in response, DHCR "reversing course"[2] cross moved Supreme Court to remit the case to DHCR for further factual findings. The Tenants opposed DHCR's request to remit and sought to uphold DHCR's initial position on res judicata and laches grounds. The Hon. Richard Braun of Supreme Court found for the Tenants and against DHCR and Sherwood on these motions by its decision of September 19, 2002. Both sides appealed to the First Department which, by its decision of October 7, 2003, Sherwood 34 Associates v. DHCR, 309 AD2d 529 (1st Dept. 2003), unanimously reversed the Supreme Court decision on the law, finding a res judicata analysis inapplicable, and the DHCR record insufficient to show how it reached the conflicting result in the two earlier orders as neither of the two set forth factual findings as a basis for the decision, and remitted the matter to DHCR for further fact finding and determination "in conformance with its governing rules."

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[2] This characterization was made by the Appellate Division.

The Appellate Division also expressly left to DHCR, in the first instance, the decision as to what date HMD status was to be determined.

Following DHCR's Remit Notice of May 4, 2004, Sherwood applied to DHCR for a determination fixing the date DHCR would consider the relevant date for the determination of HMD status. DHCR, by letter of July 9, 2004, requested Sherwood and the Tenants brief on such issue within twenty days.

Following such submissions, DHCR avoided making any determination of the relevant date for determining HMD status, advising that it declined to address the issue of the date until its final decision, relegating the parties in effect to submitting proof of status for every conceivable date from the inception of the RSA on "May 6, 1969, or any time thereafter[3]."

DHCR referred the remitted matter to its PAR procedure, bypassing the RA. The parties made extensive factual submissions relating to the configuration and operations of the two buildings as they existed from time to time over the thirty-five year period. Unsurprisingly, the submissions of the contending parties strongly disagreed as to many factual aspects, as they did as to which dates were relevant.

[3] This initial ruling effectively resulted in the parties creating an extensive record of fact relating to aspects of the ever changing configuration of the Building and its operations for thirty five years. While this Kafkaesque and burdensome situation which could have been obviated by an initial determination by DHCR on the issue which was fully briefed by the parties on DHCR's express request, CPLR Article 78 review does not extend to the challenge of procedures which are merely inane or burdensome. To the extent such procedural choices are not in violation of law or arbitrary or capricious, they are not reviewable by a Court no matter how unwise.

While many governmental agencies routinely provide for the resolution of conflicting factual assertions through an evidentiary hearing before a fact finder, after notice and an opportunity, to be heard, DHCR instead elected to dispatch an inspector to determine the facts so that DHCR could render its determination. This process in effect charged the DHCR inspector to be a finder of the facts. Choosing to use an inspector for such purpose is a procedural choice which, if not otherwise a violation of law, may be properly made by DHCR to resolve factual disputes which may be resolved by an observation.

In dispatching the inspector to observe the physical configuration of the building, DHCR directed the inspector to address the issue of whether the building is a HMD. The directive to the inspector stated, *inter alia*,

"1. St[sic] the minimum, please inspect and report, as indicated above, as to the following systems in each building." Seventeen separate building systems were then listed. The directive also requested a report on three items of common use and access, and "whether it appears that work has been done during the past thirty-six years which may have altered the configuration of the affected components in any manner." The inspector was also directed to report on any other aspect which the inspector "believe[s] may be relevant to the horizontal multiple dwelling herein and whether any such aspect[s] have been affected by work which may have been

performed within the last thirty-six years."

After visiting the Building, the inspector submitted a report to DHCR which was used by DHCR in its determination of October 4, 2007 that the Building was an HMD.

Sherwood does not challenge the use of an inspector to make an independent inspection and to ascertain facts based on such observations.[4] Sherwood instead challenges the independence and fairness of the inspector in how he conducted the inspections in this case, because the inspector did so in a manner which excluded Sherwood's representatives, but not the Tenants, and had *ex parte* communications with the Tenants at the inspection. Sherwood also challenges the inspector's report on the ground that it did not fulfill the mandate of DHCR to report fully on all items expressly to be determined.

While the inspection was originally scheduled to accord all parties an opportunity to be present at the inspection, it was not so conducted. The time for the inspection was changed shortly before it was to occur without notice to Sherwood.

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[4] DHCR routinely uses inspectors to view relevant conditions on buildings in connection with proceedings before it. Unlike these routine cases, where an inspector provides evidence to the fact finder (usually the RA), here, the inspector was effectively made the fact finder, thus casting the inspector in the role of hearing officer, and placing upon him the burden of acting like one. While an inspector who merely provides evidence to a fact finder, which may be countered by other evidence of a party, may inspect, as DHCR asserts, without notice to an owner, a hearing officer may not conduct ex parte proceedings.

The Tenants were apparently made aware of this change as they participated in the inspection and had *ex parte* communications with the inspector before Sherwood discovered the inspector was present. Sherwood asserts such activities were improper and prejudicial and led the inspector to make erroneous determinations. Sherwood only became aware of the inspection after one of the two buildings had been inspected. Having discovered such prior inspection, Sherwood asked the inspector to reinspect the first building in the presence of Sherwood's representative to allow such representative to address building systems there. The inspector refused. Sherwood asserts that the inspector, who had been accompanied by only Tenants in the inspection of the first building, made substantial errors in observations at such building, and that although Sherwood brought such failings to the attention of DHCR with substantial documentation, reinspection was denied.

Due process of law requires that, at the least, where an administrative procedure is established for the determination of facts to resolve a controversy by an independent fact finder, that the agency follow its own rules and the parties be accorded due notice and an opportunity to be heard to assure that assertions, comments or observations of one party which may be erroneous or prejudicial under such circumstances may be addressed before the fact finder by the other party to bring such errors to the attention of the fact finder. In such proceeding, the finder of fact

may not conduct *ex parte* discussions with either side. If the proper procedure is followed the determinations of an independent finder of fact must be given substantial weight in any review. However, as excluding a party from notice or an opportunity to be heard[5] deprives that party of the opportunity to address an adversary's claims and make his own assertions, a one-sided hearing is subject to challenge.

Here, after DHCR set the parameters for a proper inspection/fact finding, Sherwood was deprived of proper notice and a proper opportunity to attend at least a substantial portion of the fact finding inspection which was attended by its adversary, who made *ex parte* representations to the inspector. Sherwood's attempt to cure this improper process by requesting the inspector reinspect the Building where Sherwood was not present, or that DHCR hold a new inspection were both turned down. These defects alone require this Court to set aside the Decision of DHCR and to return this matter to DHCR for a new and proper inspection and further proceedings.

It is not for this Court to tell DHCR how to conduct its re-inspection other than to set forth some basic guidelines. They include the use of a different inspector,

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[5] Of course, a party having a reasonable notice and opportunity to be heard who waives such right by failing to appear or participate may waive his objection to the finder of fact having heard only his adversary.

untainted by the prior *ex parte* communications, and according reasonable notice and adjournments to Sherwood and the Tenants to accord both a reasonable opportunity to attend the inspection and to direct the attention of the inspector to physical matters that such party believes relevant. The DHCR's direction to the inspector to make findings of fact and set them forth in his written inspection report is proper. However, such factual findings must be in sufficient detail to provide a record on which the determination of DHCR on the legal implications of such facts and a review by the courts of the support for such decisions if a party objects. Further, to the extent the parties assert different views at the inspection, the report must report such views and address any findings as to how and why the inspector accepted or rejected such assertions again, in sufficient detail to permit eventual court review.

These requirements are necessary for several purposes. If DHCR is to make a determination by applying the law to the facts, and as the inspector makes the initial finding of facts, the inspector's determination of the facts must be equally subject to review under ordinary CPLR Article 78 standards[6]. Thus the record, both that of the

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[6] Sherwood here has also asserted that DHCR's finding that the Building should be considered an HMD based on a common commercial tenant and certain other factors were not supported by substantial evidence on the record. Under CPLR §7804(g), such a claim in a proceeding under CPLR Art. 78 is to be determined by the Appellate Division and not the Supreme Court and should be referred by Supreme Court to the Appellate Division for this purpose. However, under CPLR §7804(g), where the proceeding may be otherwise terminated without reaching such issue, Supreme Court is required to do so. The fact that for other independent reasons as set forth in this Decision and Order, this court must return this matter to

inspector and that of whoever DHCR designates to apply the facts to the law as determined by DHCR, must be sufficiently complete so as to permit such review.

Because the report of the inspector was tainted, requiring the DHCR decision to be set aside, this Court has not addressed the report to determine whether it was sufficiently detailed to meet due process minimal standards to give this Court a basis to determine whether the decision was arbitrary or capricious or whether the Appellate Division could determine whether this Court had made a proper decision or whether the determination was supported by substantial evidence on the record, in the event a party sought CPLR Article 78 review on such basis.

In this context, this Court must also note that DHCR's determination not to address the issue as to the date relevant to when the issue of HMD status is to be determined is not helpful to the resolution of this matter and to DHCR's obligations, as discussed above, to develop an appropriate record of findings of facts and conclusions of law. This problem is exacerbated by the use of an inspector as fact finder who is qualified only to make findings of facts as to the physical configuration of the building and the dates that physical changes to the building and its systems

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DHCR for further proceedings makes it unnecessary for this court to forward the case to the Appellate Division. Any claim that findings are not supportable by substantial evidence on the record should only be reviewable when the factual record is fully developed and the findings are made on remand.

occurred and not to make conclusions of law. Conclusions of law as to the relevant date was expressly referred back to DHCR by the Appellate Division. Thus, without DHCR guidance as to what date is relevant, the inspector must create a report as to every potentially relevant date raised by Sherwood or the Tenants in their submissions to DHCR on such issue sufficient to meet the standards set forth above and the requirements of the Appellate Division.

Because DHCR has not ruled on the issue as to which date is relevant, there is no determination for this Court to uphold or vacate on this issue. Further, as the First Department has already held that the issue of the applicable date must initially be determined by DHCR, this Court may not decide such issue.[7] For this reason alone, this Court must set aside the Decision and return it to DHCR to complete its task as required by the First Department. Of course, when it does, any party aggrieved may again seek Article 78 review.

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[7] If this Court were to decide the issue it would note that, as the authority for the RSL is based on an emergency found by the legislature, the definition of which units are subject to the RSL would be fixed at to the time of the enactment of the RSL. The text of RSL §25-504 reinforces this result. This review that the enactment date controls is also supported by the fact that newly constructed units are expressly exempted from the RSL and once subject units are not destabilized by a subsequent reduction of the number of residential units in a multiple dwelling to less than six. This Court also notes that it is also appropriate in a dispute to consider the date the proceeding commenced to be a relevant date to decide the dispute. As the Appellate Division has directed DHCR to decide this issue, this Court is not deciding this issue. Accordingly, this footnote is an observation and not a determination and is at most dicta and probably less authority than that.

Sherwood has submitted to DHCR and to this Court a long list of factors which Sherwood claims are conclusive as to its claim that the two buildings are not an HMD. However, the Tenants have their own list of factors as well. In its Determination, DHCR virtually ignores Sherwood's list. As DHCR has not issued regulations to create safe harbors or standards for an HMD determination, the Court may only address whether a determination by DHCR that a particular configuration of factors present at a specific time may properly support a determination whether the buildings are an HMD and whether such determination is supported by law and precedent. To do so, the Court must begin both with a factual determination as to the buildings' configuration, a decision as of a date which DHCR finds as a matter of law is the relevant, date and review DHCR's explanation as to how and why it has balanced the various factors in reaching its Determination. This Court finds it arbitrary and capricious for DHCR not to have addressed these assertions of Sherwood, both as a factual matter as to whether in fact such states of fact existed and how they are to be weighed and considered as a matter of law in making the determination whether the buildings are HMD. Because of the incomplete determination of DHCR, it is premature for the Court to address whether DHCR has properly determined the buildings to be an HMD at this point. In so finding, the Court recommends to DHCR that it consider and address the factors advanced by

both parties and their materiality in its decision in sufficient detail so that this dispute, now in its 23rd year, may be finally resolved before another generation passes.

Sherwood finally complains that DHCR improperly cited Sherwood's work at the building on May 20, 2005 as a reason to deny reinspection. Sherwood notes that although DHCR faulted Sherwood for conducting the work surreptitiously to create different facts on the ground, DHCR knew and had acknowledged the performance of such work. Sherwood thus asserts DHCR's use of work as a reason to deny a new inspection was arbitrary and capricious. As this Court has set aside the PAR and has required that DHCR conduct a new inspection and fact finding process, this issue is now moot and need not be addressed in this Decision and Order.

Sherwood has also urged this Court direct DHCR to adopt regulations as to what standard are to be applied in determining whether an HMD exists. While such regulations or standards undoubtedly would have also been helpful in avoiding the need to litigate this matter for twenty-three years and certainly would have been appropriate if properly adopted, the determination of whether an HMD exists in most other cases probably has been resolved as the issue was primarily relevant in 1969, 1974 and 1983 when the overwhelming majority of buildings now subject to the RSL

became so.[8] As it is likely that the instant dispute, running for over twenty-three years may be the last or one of the last to be determined on this issue, the development of regulations at this time on this issue is tantamount to shutting the barn door after the cow has been stolen. Further, however, helpful to a resolution of HMD controversies, including whether the DHCR decision in this case was or may in the future be arbitrary or capricious, this Court has no authority to impose such a requirement. In any event, should, as required by this Decision, a new determination on this matter be made by DHCR, and a party be unhappy, such party may bring yet one more Article 78 proceeding to see whether DHCR finally got the matter right, made an appropriate record and accorded the parties due process of law.

Accordingly, based on the foregoing, the Decision must be vacated and the matter is returned to DHCR for further proceedings, not inconsistent with this Decision and Order.

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[8] Apartments in buildings constructed pursuant to Real Property Tax Law §421-a also become subject to the RSL when built. As they are made subject to the RSL by such law, issues of whether they are ordinary multiple dwellings HMD's at that time are therefore moot.

This is the Decision and Order of the Court.

DATED: NOVEMBER 17, 2008
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court