

Hirtenstein v One York Property LLC

2009 NY Slip Op 30275(U)

February 5, 2009

Supreme Court, New York County

Docket Number: 112972/08

Judge: Matthew F. Cooper

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

PRESENT: MATTHEW F. COOPER
Justice

PART 52

Michael Hirshenstern

INDEX NO.

112972/2008

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

- v -

One York Property, LLC and Depts.
of Buildings of the City of New York

The following papers, numbered 1 to 4 were read on this motion to ~~for~~ dismiss

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

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

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED

FEB 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/5/09

MG
MATTHEW F. COOPER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
MICHAEL HIRTENSTEIN

Petitioner,

-against-

ONE YORK PROPERTY LLC and DEPARTMENT OF
BUILDINGS OF THE CITY OF NEW YORK,

Respondents.
-----X

Index No. 112972/08
Mot. Seq. No. 002

DECISION AND ORDER

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Papers and exhibits considered in review of the motions and cross-motions:

Notice of Motion:	1
Memo in Support of Motion	2
Affirmation in Opposition	3
Affirmation in Further Support	4

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Matthew F. Cooper, J.

Petitioner brought this Article 78 proceeding challenging the determination of respondent Department of Buildings of the City of New York ("DOB") to issue a Temporary Certificate of Occupancy ("TCO") pursuant to New York City Administrative Code ("Administrative Code") § 27-218. DOB now moves¹ to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(2) on the grounds that (1) the Court lacks subject matter jurisdiction to hear the claim against DOB as the proceeding is not ripe for judicial review since petitioner failed to exhaust all administrative

¹Although DOB labels its motion as a cross-motion, no other motion has been made in connection with this motion sequence. Consequently, it will be referred to as a motion.

* 3]
remedies prior to commencing this proceeding and (2) even if the petition is ripe for review, DOB's decision to issue and renew the TCO was not arbitrary and capricious, but a reasonable and rational exercise of DOB's administrative authority. For the reasons herein discussed, the motion to dismiss is granted.

Factual Background

Petitioner entered into a Purchase Agreement ("the Agreement") and Rider dated September 19, 2006, with respondent One York Property LLC ("One York") for the purchase of three apartment units to be combined into one unit (hereafter collectively "Unit 7") in the building at One York Street, New York, New York. Pursuant to the Agreement, petitioner was required to close on Unit 7 and pay in full upon One York obtaining a TCO for Unit 7 from DOB.

On April 7, 2008, upon request by One York, DOB inspected the subject building to determine the propriety of issuing a TCO. After inspection, DOB approved the cellar, residential lobby, and floors 3-5, excluding unit 5G, for temporary use and occupancy. One York then submitted a "PW-7: Certificate of Occupancy/Letter of Completion Folder Review Request" ("PW-7") form, serving as its request for a TCO. On May 28, 2008, as a result of the April 7 inspection, DOB issued a TCO for the cellar, residential lobby, and floors 3-5, excluding unit 5G, to expire on August 26, 2008. DOB conducted another inspection of One York Street on July 9, 2008, to determine if the previously issued TCO should be renewed and a new TCO issued for additional areas of the building. As a result of the inspection, DOB renewed the TCO for the cellar, residential lobby, and floors 3-5, and issued a new TCO for unit 5G, floors 6-9, 12, and 13 on July 25, 2008, to expire on October 25, 2008.

In accordance with the Agreement, One York scheduled a closing for August 21, 2008.

Petitioner failed to attend the closing because he claimed the TCO for Unit 7 was improperly issued. A letter of default was sent to the petitioner by One York stating that if he failed to cure his default by closing title on September 26, 2008, the purchase agreement would be deemed canceled, the monies paid by petitioner would be considered as liquidated damages, and One York would seek additional damages. On October 7, 2008, DOB renewed the TCO for the cellar, lobby, floors 2-9, 12, and 13, and issued a TCO for floor 10, to expire on January 9, 2008.

Procedural Background

By Order to Show Cause, signed and dated Sept 24, 2008, and Summons and Complaint verified on September 23, 2008, petitioner commenced this action to enjoin preliminarily and permanently One York from enforcing or canceling the Agreement, for damages for breach of contract and breach of the covenant of good faith and fair dealing, and for a judgment declaring that he is not in default of the Agreement. Petitioner argued that the TCO was improperly issued because the condition of Unit 7 was unsafe and uninhabitable and failed to satisfy the most basic requirements for issuance of a TCO at the time of issuance. As against DOB, petitioner sought a ruling that the TCO issued on July 25, 2008 was invalid. On October 2, 2008, One York moved to dismiss the complaint. At oral argument before Justice Paul G. Feinman on October 8, 2008, DOB informed the court that it was treating petitioner's Summons and Complaint as an appeal of the issuance and renewal of the TCO dated July 25, 2008, and that as a result, it would reinspect the building to determine if the TCO had been properly issued and renewed. After an inspection of the building on October 17, 2008, DOB found that the TCO had in fact been properly issued and renewed inasmuch as the inspection revealed that the building met the requirements set forth by Administrative Code § 27-218. Petitioner then hired a private building consultant who conducted

an inspection of the Unit and came to the conclusion that a TCO should not have been approved.

On November 7, 2008, Justice Feinman issued a decision denying petitioner's request for a preliminary injunction, enjoining the closing from taking place, dismissing the claims as against One York, and converting the action to an Article 78 proceeding as against DOB. Respondent DOB now moves to dismiss the petition on the ground that the court lacks subject matter jurisdiction because petitioner has failed to exhaust all administrative remedies available prior to commencing this proceeding.

Analysis

Respondent DOB argues that its motion to dismiss should be granted because petitioner has not exhausted those administrative procedures available for contesting its issuance of the TCO. Thus, according to DOB, the issue is not ripe for judicial review. DOB asserts that judicial intervention is premature as the CPLR, the Administrative Code, and the New York City Charter ("NYCC") provide petitioner with the appropriate administrative process for appealing DOB's decision, and petitioner has not exhausted these procedures. Petitioner argues that the rule of exhaustion is not applicable in that it has demonstrated circumstances which constitute an exception to the rule.

The Commissioner of Buildings at DOB, through the grant of power by Administrative Code § 27-218, has the discretion to, "upon request, issue a temporary certificate of occupancy for a part or parts of a building before the entire work covered by the permit shall have been completed, provided that such part or parts may be occupied safely prior to completion of the building and will not endanger public safety, health, or welfare." Once the Commissioner has decided to grant or deny the issuance of a TCO, an aggrieved party may appeal the Commissioner's conclusion to the Board

of Standards pursuant to the procedures of the Board. Administrative Code § 26-250 (“appeal from any decision or interpretation of the . . . commissioner may be taken to the board of standards”); NYCC § 648 (explaining that “appeals may be taken from decisions of the commissioner [of buildings]. . . acting under a written delegation of power. . . to the board of standards and appeals”). The Board of Standards has the authority to “hear and decide appeals from and review. . . any order, requirement, decision or determination of the commissioner of buildings.” NYCC § 666(6). Based on this statutorily provided appellate process, DOB argues that it is entitled to dismissal as petitioner, by initiating this proceeding prior to pursuing review by the Board of Standards, has failed to exhaust all available administrative remedies.

CPLR § 7801(1) provides that an Article 78 proceeding “shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application.” An administrative determination will be final and binding where the agency has “reached a definitive position on the issue that inflicts actual concrete injury and second, the injury may not be. . . significantly ameliorated by further administrative action or by steps available to the complaining party.” *Walton v. New York State Dept. of Correctional Services*, 8 NY3d 186, 194 (2007). An individual who objects to the determination of an administrative agency must first “exhaust all available administrative remedies before being permitted to litigate in a court of law.” *Watergate II Apts v. Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978).

The rule requiring a party to first exhaust all administrative remedies before seeking judicial review is not absolute. One recognized exception is where an agency's action is challenged as

“wholly beyond its grant of power.” *Id.*; *Bankers Trust Corp. v. New York City Dept. of Finance*, 301 AD2d 321, 328 (1st Dept 2002). This exception, however, “is limited to situations where the statute or administrative scheme itself is alleged to be unconstitutional, thus undermining the legality of the entire proceeding.” *Martinez 2001 v. New York City Campaign Finance Bd.* 36 AD3d 544, 549 (1st Dept 2007) (challenge to the Board’s authority to act was not exempted from the exhaustion requirement as no allegation that the program scheme itself was unconstitutional); *see also Sohn v. Calderon*, 78 NY2d 755, 767 (1991). Challenges to an agency action alleging factual or mathematical errors, where the agency was entrusted by the legislature with adjudicatory functions requiring substantial technical or policy expertise, are subject to the exhaustion rule and the courts are generally divested of initial jurisdiction to consider a particular technical issue or interpretation of fact. *Bankers Trust* at 327-28. *Rockaway One Co., LLC v. Wiggins*, 35 AD3d 36, 40-1 (2d Dept 2006). Courts will generally not disturb an agency’s findings when the particularized expertise of the agency is required in making a determination and interpretation of facts. *Flacke v. Onondaga Landfill Systems*, 69 NY2d 355, 362 (1987)(not allowing the reviewing court to substitute its judgment for that of the agency with respect to interpretation of facts and application of regulations the agency is tasked with enforcing).

In this case, petitioner argues that when DOB issued the TCO, the condition of Unit 7 did not comply with the requirements of Administrative Code § 27-218. Specifically, petitioner claims Unit 7 had multiple unsafe conditions, including fire hazards, rendering it uninhabitable. The manner in which DOB chose to apply the statute to these facts, petitioner argues, was beyond DOB’s statutory grant of power as the provision allowing for the issuance of a TCO was enacted to permit occupancy only where cosmetic items remain to be completed. Petitioner, therefore, challenged

DOB's factual determinations as inconsistent with the statutory provisions outlining its authority to issue a TCO.

Although petitioner argues DOB's action was wholly beyond its statutory grant of power, thus attempting to bring the petition within an exception to the rule of exhaustion, petitioner is merely challenging DOB's factual findings as to the condition of the premises at One York and its application of the statute to these facts. Because petitioner is not alleging that the statute or administrative scheme itself is constitutionally defective, but is simply alleging a misapplication of the statutory language, the exemption to the exhaustion rule is inapplicable. *See Martinez 2001* at 549 (asserting that the unconstitutional exhaustion rule "exception is limited to situations where the statute or administrative scheme itself is alleged to be unconstitutional").

Petitioner further asserts that even if DOB had the authority to issue the TCO, he was not required to exhaust all administrative remedies prior to seeking judicial relief as he would sustain irreparable injury by being compelled to close on an unsafe and uninhabitable condominium. A party is not required to exhaust administrative remedies where to do so would cause irreparable injury. *Watergate II Apts v. Buffalo Sewer Auth.*, 46 NY2d at 57. Here, however, no showing has been made that petitioner is now faced with such injury. Because Justice Feinman refused to stay the closing date, that date has already passed and thus an expedited judicial review would in no way serve to forestall the closing from taking place.

In light of the foregoing, it is

ORDERED that the Department of Buildings of the City of New York's motion to dismiss the petition is granted; and it is further


ORDERED that upon service upon him of this order and decision with notice of entry, the

[*9]
Clerk of the Court is directed to enter judgment dismissing the petition in its entirety.

This constitutes the decision and order of the court.

Dated: February 5, 2009

ENTER:



Matthew F. Cooper, J.S.C.

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