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

PRESENT: HON. NICHOLAS FIGUEROA, J.S.C. Justice PART 46

Index Number : 115998/2008

MAS LLP.

INDEX NO. _____

VS

N.Y.C. LOFT BOARD

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	1
Replying Affidavits _____	1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denial.

See accompanying decision and judgment

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).

Dated: Aug. 5, 2009

_____ J.S.C.

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

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

----------X

In the Matter of the Petition of

MAS LIMITED LIABILITY COMPANY,

Petitioner,

Index No. 100071/09

- against -

DECISION AND JUDGMENT

NEW YORK CITY LOFT BOARD,

Respondent,

for a Judgment under Article 78 of the Civil Practice Law and Rules.

Nicholas Figueroa, J.S.C.:

This Article 78 petition seeks to nullify an order of the New York City Loft Board denying petitioner's application for a declaration of abandonment pursuant to Article 7-C of the Multiple Dwelling Law ("MDL") and title 29, section 2-10(f), of the Rules of the City of New York. The challenged order affirmed the report of an administrative law judge ("ALJ") following an inquest.

At the inquest, petitioner offered the brief testimony of one witness, the managing agent of petitioner's multi-unit building. The witness stated that he had managed the property from the time that petitioner purchased it in 1997. He recalled that the subject first-floor unit was at that point occupied by a commercial tenant ("R"), and that any residential fixtures had by then been removed (assuming that any had ever been in place). The witness testified that "R" had vacated the unit in 2003 and was directly replaced by another commercial tenant ("S"). In connection with the foregoing, petitioner put into evidence two commercial leases for the subject unit, in

combination covering the period from 1992 to the present. With so much established, petitioner rested its case for a finding of abandonment.

It is observed that petitioner had given notice of its Loft Board application to "R" and "S" as well as to the current residential tenants in the building's three other units. None of such persons had filed an answer. Notice of the scheduled inquest had thereafter been given to the same persons, but none had appeared.

Abandonment applications are governed by section 2-10(f) of title 29 of respondent's Rules, which provides that

> [a]n owner or its authorized representative may apply to the Loft Board for a determination that the occupant of an Interim Multiple Dwelling (IMC) unit has abandoned the unit and no sale of rights pursuant to Multiple Dwelling Law § 286(12) or sale of fixtures pursuant to Multiple Dwelling Law § 286(6) has been executed, provided there has been no finding of harassment as to any occupants(s) of the unit which has not been terminated pursuant to § 2-02(d)(2) of the Board's Harassment Regulations.

Section 2-10(f) defines "abandonment" as "the voluntary relinquishment of possession of a unit and all rights relating to a unit with the intention of never resuming possession or of reclaiming the rights surrendered." The section further lists the following nine factors that, among others, may have bearing on the question of abandonment:

> (1) the length of time the occupant allegedly abandoned the unit,
> (2) whether the occupant owed rent at the time the occupant allegedly abandoned the unit,
> (3) whether the occupant's lease for the unit has expired,
> (4) whether the occupant provided notice of an intent to vacate or requested permission to sublet the unit,
> (5) whether the unit contained any improvements which were made or purchased by the occupant and whether the occupant was reimbursed for those improvement,

(6) whether any prior harassment findings have been made by the Loft Board concerning the occupant(s) of the unit or whether any harassment application remain[s] pending,
(7) whether any violations or notices to appear pursuant to the Loft Board's Minimum Housing Maintenance Standards have been issued,
(8) whether the owner made affirmative efforts to locate the occupant to attempt to purchase rights, and
(9) whether the inspection of the unit by the Loft Board staff indicates that the unit is presently vacant.

In view of the special protections enuring to the residential tenant to whom the Loft Law applies (*see Matter of Jorden*, 8 Misc. 3d 789, *aff'd as modified*, 27 AD3d 305), it is understandable that the owner would have the burden of showing that, such benefits notwithstanding, the tenant had abandoned his unit (and the benefits incidental to it) (*Matter of 1314 Development*, LLC, OATH Index No. 1804/07, at 4 (June 21, 2007), *adopted*, Loft Bd. Order No. 3483 (January 15, 2009). It is no less reasonable that respondent's regulations require the owner to give notice to "affected parties," including any "occupant" having a stake in the outcome (section 1-06[a] of the Rules).

Judicial review under Article 78 of the CPLR is limited to consideration of whether the challenged administrative action is arbitrary and capricious or lacks a rational basis (see Pell v Board of Education, 34 NY2d 222, 231). To the extent that such action is based upon the agency's reading of its own regulations, the agency's construction is to be allowed great deference (*see IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal*, 10 NY23d 474, 481).

Petitioner proposes that respondent was arbitrary and capricious in two alternative respects. First, petitioner asserts that respondent's decision on the merits veered from

respondent's own precedents. Second, petitioner maintains that in any event respondent also departed from its own precedents by failing to hold its proceedings in abeyance to allow petitioner to supplement the record.

More specifically, petitioner faults respondent for purportedly denying the application solely on the ground that petitioner had not tried to locate the former residential tenant. But, as reference to the record makes clear, it was petitioner, rather than respondent, that proposed to support its position by resting on a single reed, *i.e.*, the lapse of time since the subject unit had been occupied by other than a residential tenant. To be sure, almost 15 years had passed since a residential tenant might have occupied the premises. But the evidentiary difficulty posed by the passage of time was to a significant extent a self-inflicted injury on the part of petitioner, since it did not file its application until some nine years after it had acquired the building. Moreover, as the ALJ observed in her report, petitioner had made no effort to obtain from available sources – such as the Loft Board records, the former owner and former and current tenants – information that might have explained why the former residential tenant had quit the premises or why the former owner had not for its part sought to obtain an abandonment declaration. Instead, petitioner had offered nothing more concrete than the speculation of the managing agent that there had been no harassment findings or violations issued in the time pre-dating his association with the building. Indeed, as the ALJ also observed, petitioner had not even gone so far as to obtain documents to support the threshold proposition baldly asserted in the instant petition, *i.e.*, that the subject unit was in fact covered by the Loft Law. But respondent's precedents do not support petitioner's apparent theory that it could prove the highly fact-charged matter of abandonment by merely pointing to the passage of time since a departure that petitioner left

wholly unexplained (*see Matter of Windsor Construction Assoc.*, OATH Index No. 310/07, at 5-6, (Dec. 12, 2006), *adopted*, Loft Bd. Order No. 3477 (Nov. 20, 2008, *and cases cited therein*).

As the foregoing indicates, petitioner's failure to attempt to identify and locate the former residential tenant was not the only ground for respondent's decision. This is not to ignore that respondent clearly viewed such failure as a major defect in petitioner's case. That view was neither unprecedented (*see, e.g.*, Matter of EPDI Assoc., 60 AD3d 472; Matter of Windsor, supra) nor a patent misreading by respondent of its own regulations. In the light of the meager case that petitioner had brought before it, respondent cannot be deemed to have been irrational in its outright denial of the application. Nor was such outright denial, as petitioner would have it, a break with respondent's precedents (*see Matter of 117 Hester Realty, LLC,* Loft Bd. Order No. 3139 [Jan. 18, 2007); *Matter of Freeman*, Loft Bd. Order No. 324 [Nov. 16, 2006], *reversing* OATH Index No. 1937/06 [Aug. 2, 2006]; *Matter of Windsor, supra).*

For the foregoing reasons, the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: August 5, 2009

ENTER:

J.S.C.