

**Matter of 128 Hester St. Tenants Assoc. v 128 Hester
LLC**

2009 NY Slip Op 32284(U)

October 2, 2009

Supreme Court, New York County

Docket Number: 111290/2009

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN
Justice

PART 12

In re: 128 Hester Street Tenants Association, etc.

INDEX NO. 111290/09

MOTION DATE 9/4/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

128 Hester LLC, et al.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

see attached

Cross-Motion: Yes No

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

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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

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: 10/2/09

Paul G. Feinman
J.S.C.

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 12

-----X
In the Matter of the Application of 128 Hester Street
Tenants Association, Hun Siu Chu (Apt. 1), Kok Hoowg
The, (Apt. 2), Eng Kam Li (Apt. 3), Wang Ai Yu
(Apt. 4), Ji De Yang and Han Juan Qing (Apt. 5), Alice
Jean and John Jean (Apt. 7), Duan Liang Chen (Apt. 8)
and Cha Oi Hoy (Apt. 9),

Index No. 111290/2009
Mot. Seq. No. 001
Submission Date 9/4/09

Petitioners,

- against -

128 Hester LLC, Kyaw Myint, William Chan, Robert D.
LiMandri, Commissioner of NYC Department of
Buildings,

Respondents,

Hong Kong Station, Inc.,

Intervenor,

For Judgment Pursuant to Article 78 of the CPLR
reversing the Respondent LiMandri's Order of August 6,
2009 requiring the demolition of premises located at
128 Hester Street, New York, New York.

-----X
Papers considered in this Article 78 proceeding:

PAPERS	NUMBERED
Order to Show Cause, Petition, Annexed Aff. & Exhibits	1
Notice of City's Cross Motion to Dismiss, Annexed Aff. & Exhibits	2
Aff. of Co-Respondent's Counsel in Support of Cross Motion & Exhibits	3
Aff. of Intervenor's Counsel in Opp. to Cross Motion & Exhibits	4
Aff. of Petitioner's Counsel in Opp. to Cross Motion & Exhibits	5
Transcripts of Appearances on August 12 and 21, 2009	6, 7

Appearances: **Petitioner:**
John D. Gorman, Esq.
33 Whitehall Street
16th Floor
New York NY 10004
(212) 509-8664

Respondent City of New York:
Michael A. Cardozo, Esq.
Corporation Counsel
By: Christina L. Hoggan, Esq.
100 Church Street
New York NY 10007
(212) 788-0461

Intervenor Hong Kong Station, Inc.: Respondents 128 Hester LLC and Kyaw Myint:
Howard W. Rachlin, Esq.
11 Park Place
New York NY 10007
(212) 964-2552

Stuart A. Klein, Esq.
By: Abigail Patterson, Esq.
99 Madison Avenue, 11th Floor
New York NY 10016
(212) 564-7560

PAUL G. FEINMAN, J.:

In this Article 78 proceeding petitioners seek judicial review of a determination by the Commissioner of the Department of Buildings (DOB) requiring the immediate demolition of the premises located at 128 Hester Street, New York, New York (the Premises). They also seek injunctive relief.

Respondent DOB cross-moves, pursuant to 3211 (a) (7), to dismiss the Petition for failure to state a cause of action. Petitioner and intervenor Hong Kong Station, Inc.¹ oppose the cross motion, arguing that the DOB's declaration was arbitrary and capricious.

Background

The building located on the Premises is a six-story residential building (the Building) which dates back to the 1800's. In 1940, the building located next door at 126 Hester Street was demolished, leaving the eastern wall of the Building exposed. In 2007, the building located on the other side at 91-93 Bowery Street (91-93 Bowery) was demolished in order to provide more space for the construction of an 18-story hotel.

In 2006, the owner of 126 Hester Street began to construct a new building. Thereafter, in 2007, the owner of 91-93 Bowery began to construct the hotel. The excavation and foundation work performed at the two properties caused collateral damage to the Building's foundation. The DOB began monitoring the Building's safety. The DOB issued multiple violations to 126 Hester Street and 91-93 Bowery, and required the owner of the latter to stabilize the damage to the Building. In early 2008, the owner of 126 Hester Street abandoned its construction project.

¹Hong Kong Station, Inc. is a commercial tenant in the premises and was granted permission to intervene by so-ordered stipulation of all parties dated August 21, 2009.

Between 2005 and 2009, the Building also received multiple violations from the DOB, including failure to repair corroded steel supports and rebars, defective, rotted wooden joists and cracked exterior walls. On July 12, 2007, respondent 128 Hester LLC purchased the building. It is asserted that the owner of the Building also owns 91-93 Bowery. Upon purchasing the building, 128 Hester LLC proceeded to take measures to stabilize the building. On August 3, 2007, the DOB issued a letter of completion approving the stabilization work.

On May 28 and June 29, 2009, the DOB found hazardous conditions in the lintels at the front and rear facades of the Building, and in June, issued an Emergency Declaration requiring that the Building's owner "immediately shore/brace the window lintels at front and rear" and ensure "egress through the fire escapes" (*see* Emergency Declaration, dated June 15, 2009, Affirmation of Christina L. Hoggan, Ex. E). On August 5, 2009, the DOB inspected the Premises and determined that the Building was in danger of collapsing, and issued a peremptory vacate order (*see* Hoggan Aff., Ex. C). On August 7, 2009, the DOB, pursuant to New York City Construction Code § 28-215.1, issued an Emergency Declaration ordering the New York City Department of Housing Preservation and Development (NYCHPD) to demolish the Building. That same day, a copy of the Emergency Declaration was sent to the Building's owner, who was also further advised that if it did not commence the necessary repairs or demolition work immediately, the City would begin the remedial work (*see* August 7, 2009 letter from Magdi Mossa, P.E., NYC Buildings Borough Commissioner, Manhattan to 128 Hester LLC, Hoggan Aff., Ex. H).²

² "There are two types of emergency declarations: 'Immediate Emergency Declaration' and standard 'Emergency Declaration.' Building owners issued an Immediate Emergency Declaration should initiate remedial work immediately; work conducted pursuant to a standard

According to the Emergency Declaration, the Premises is a

“six story brick building with wood joist floors [] leaning approximately 10 inches towards [the] east side of [the] building. Building has suffered severe structural damage to rubble store foundation walls during construction of new building at 93 Bowery and 126 Hester Street. The building is structurally compromised, floors sagging and leaning and is in imminent danger of collapsing. Remedy: Demolish to grade and remove all debris. Provide construction fence[.]”

(see Emergency Declaration dated 8/7/09, Hoggan Aff., Ex. B).

On August 7, 2009, petitioners commenced the instant action by order to show cause, seeking a temporary restraining order (TRO) against the DOB and 128 Hester LLC, enjoining them from demolishing the Building. Another justice of this court heard the parties and denied the TRO, but signed the Order to Show Cause. The parties subsequently appeared before this court, and, agreed to work cooperatively to ensure that the tenants' personalty was promptly and properly inventoried and stored, exchange of the report of the landlord's structural engineer, and providing access to a structural engineer engaged by the petitioners for a non-invasive inspection of the premises.

Discussion

The standard of review in this Article 78 proceeding is whether the DOB's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of

Emergency Declaration should be initiated within 60 days of the order" (*COMMISSIONERS ANNOUNCE COMPLETION OF CITYWIDE REVIEW OF OUTSTANDING EMERGENCY DECLARATIONS*, http://nyc.gov/html/dob/html/news/pr_emergency_declar.shtml, May 5, 2008, accessed Sept. 17, 2009).

Appeals has held “that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable” (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 107 [1st Dept 2003]). A court may not overturn an agency’s decision simply because it would have reached the opposite conclusion (*id.*).

Moreover, “one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (*Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140 [1995] [internal quotation marks and citation omitted]). Here, the Board of Standards and Appeals is the appropriate reviewing agency for DOB determinations (New York City Charter § 666 [6] [a]; *Matter of Delafield 246 Corp. v Department of Bldgs. of City of N.Y.*, 218 AD2d 613 [1st Dept 1995]).

Petitioners do not allege that the DOB acted beyond its grant of power, or that review by the administrative agency would be futile, rather, they assert that

The central question presented in the Petition is whether the DOB’s judgment as to the immediacy of the danger presented by the condition of [the Building] rules out any alternative to demolition and whether the DOB has stated in sufficient detail the basis for its action to require demolition.

(*see* Affirmation of John D. Gorman, p. 2, ¶ 3). “[T]he resolution of [such] factual questions ... should initially be examined by the administrative agency having responsibility over the matter to establish the necessary factual record” (*Wilkins v Babbar*, 294 AD2d 186, 187 [1st Dept 2002]).

According to the Board of Standards and Appeal’s rules and procedures, an appeal must be

filed within 30 days of a final determination of the Commissioner of the Department of Buildings. Based on the August 7th letter (Hoggan Aff, Ex. H), it appears that a final decision has yet to be made as to whether the building can be repaired.

As petitioners have failed to exhaust their administrative remedies, the proceeding before this court is premature, and the cross motion to dismiss should be granted (*see Wilkins*, 294 AD2d 186, *supra*; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52 [1978]). Nor have the petitioners shown that exhaustion of their administrative remedies would be futile. In light of the foregoing, the court need not further address the application for a preliminary injunction.


Conclusion

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent Robert D. LiMandri, Commissioner of NYC Department of Buildings as taxed by the Clerk of the Court.

This is the decision, order and judgment of the court.

ENTER:



J.S.C.

Dated: October 2, 2009

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).

2009 Pt 12 D&O_111290_2009_001_LD_LT