

Salnikova v Cuomo

2010 NY Slip Op 32791(U)

October 1, 2010

Supreme Court, New York County

Docket Number: 117881/2009

Judge: Saliann Scarpulla

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

PART 19

Index Number : 117881/2009
SALNIKOVA, VERA
VS.
CUOMO, ANDREW
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

*petition and cross motion are
decided in accordance with
the accompanying decision and
order.*

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: 10/1/10

Saliann Scarpulla
SALIANN SCARPULLA

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----- X
VERA SALNIKOVA, individually and as President
of 30 LINCOLN PLAZA AD HOC TENANTS
COMMITTEE, and SCOTT PETEPIECE,

Petitioners,

-against-

Index No.: 117881/2009
Submitted: 6/30/2010

ANDREW CUOMO, as Attorney General of the
State of New York, and S & P ASSOCIATES
OF NEW YORK, LLC,

Respondents.

----- X

For Petitioners:
McLaughlin & Stern LLP
260 Madison Avenue
New York, NY 10016

For Respondents:
Andrew M. Cuomo
Attorney General of the State of New York
120 Broadway
New York, NY 10271

For Respondent S&P Associates:
Rosenberg & Estes, P.C.
733 Third Avenue
New York, NY 10017

Papers considered in review of this petition and cross motions to dismiss:

Amended Petition	1
Amended Mem of Law	2
Cross Motion and Opp	3
Cross Motion and Opp	4
Aff in Support.	5
Aff in Opp	6
Mem of Law in Opp	7
Mem of Law in Support	8
Mem of Law in Support	9

UNFILED JUDGMENT
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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).

HON. SALIANN SCARPULLA, J.:

Petitioners Vera Salnikova ("Salnikova"), individually as a tenant, and also a
member of the 30 Lincoln Plaza Ad Hoc Tenants Committee ("Committee"), and Scott
Petepiece ("Petepiece") (collectively the "petitioners") commenced this Article 78 against

respondents Andrew Cuomo, as Attorney General of the State of New York (“AG”), and S & P Associates of New York, LLC (“sponsor”), seeking rescission and/or amendment of the AG’s approval of a condominium conversion offering plan which was declared effective on August 24, 2009. Petitioners contend in their amended petition that the AG exceeded its lawful authority and abused its discretion in approving the eighth amendment to the plan, which declared the offering plan effective.

The sponsor cross-moves, pursuant to CPLR 3211 (a) (1), (3) and/or (7), and 7804 (f), for an order dismissing and/or denying the amended petition. The AG cross-moves, pursuant to CPLR 3211 (a) (1), and (7), and 7804 (f), for an order dismissing the amended petition.

Background

The sponsor of 30 Lincoln Plaza, a building located at 30 West 63rd Street in New York, New York, submitted a condominium conversion plan to the AG on September 21, 2007. The building opened in 1979 as a mixed commercial and residential rental building. Its offering plan was promulgated by the sponsor, a New York limited liability company, which owns a portion of the building. The building is comprised of 32 stories, a penthouse and a penthouse roof. As per the amended petition, the unnamed committee petitioners were tenants of the building on September 21, 2007. These members allegedly do not want their names to be disclosed for fear of retribution.

General Business Law (GBL) § 352-eeee, or the “Martin Act,” provides that offering plans must be submitted to, and approved by, the AG before buildings may shift from residential rental status to condominium or cooperative ownership status. The Martin Act was designed as a way to encourage these conversion plans but still protect non-purchasing tenants from eviction, unconscionable rent increases, or coercion into purchasing their units.

Under the Martin Act, the AG is authorized to issue regulations concerning the requirements of offering plans and amendments to an offering plan. Current bona-fide tenants are given an exclusive opportunity to purchase the units within the building for 90 days after the plan is submitted to the AG. The sponsor is then given fifteen (15) months from the date of the initial filing to execute contracts of sale to 15% of the units in order to complete the conversion process and file a non-eviction plan. A sponsor who is able to garner purchase agreements from 51% of bona-fide tenants may file an eviction conversion plan. After the completion of these contracts of sale, the sponsor must submit to the AG an effectiveness amendment. The offering plan may only be declared effective if the effectiveness amendment is approved. The AG “may, but is not required to, inquire into the truth, accuracy and fullness of the disclosures made.” *Matter of Gonkjur Associates v. Abrams*, 82 A.D.2d 683, 689 (1st Dept 1981), *aff’d* 57 N.Y.2d 853 (1982).

Here the sponsor submitted a non-eviction plan on September 21, 2007, which would allow current bona-fide tenants to purchase their unit or other units in the building

at a 25% discount from the listed market price as it was submitted to the AG. The tenants were originally given 90 days as an exclusive period to purchase their units at the discounted rate. This exclusive period was extended four times, until July 22, 2008. As of July 22, 2008, there were only 43 purchase agreements signed by tenants.

For the plan to be effective, the sponsor needed to establish that it had entered into 15%, or 87 purchase agreements from tenants or people who intended to occupy the units after purchase. The sponsor required non-tenant purchasers to execute an affidavit that either they or their family members intended to occupy the unit. Petitioners note that the offering plan states the following with regards to pricing:

Sponsor may change offering prices by amendment to the Plan when the change in price: (i) is an across the board increase or decrease affecting one or more lines of Residential Units, or (ii) is to be advertised, or (iii) is a price increase for an individual Purchaser (other than Tenant-Purchasers until the Effective Date of the Plan). However, Sponsor reserves the right to decrease Purchase Prices or modify other terms of sale without filing an amendment to the Plan at any time during the offering period if such a decrease in Purchase Price or modification of such other terms of sale does not constitute a change in the general offering or an advertised price but is rather the result of an individually negotiated transaction.

The Purchase Prices to Tenant-Purchasers set forth in Schedule A will not increase during any Exclusive Purchase Period nor will Sponsor accept Purchase Agreements from non-occupant Purchasers for occupied Residential Units during any Exclusive Purchase Period. Unless it would constitute a discriminatory inducement, Sponsor reserves the right, at any time and from time to time, without giving prior notice (except as otherwise provided herein) and without any consent of any member of the Condominium Board, the

* 6]

Condominium, or its agents or any Residential Unit Owner or mortgagee, to individually negotiate terms of sale with Purchasers (other than Tenant-Purchasers until the Effective Date of the Plan) with respect to the Purchase Agreement including, without limitation, changing the price, the manner of payment thereof and other terms of sale of any Residential Unit. If any such change is made, a Purchaser of a Residential Unit affected thereby may pay more or less than other Purchasers under the Plan for similar Residential Units, but this will not affect any prior or subsequent sale of Residential Units which are not the subject of such change.

After July 22, 2008, apparently as a reaction to the deteriorating market conditions, the sponsor reduced the prices to non-tenants. The sponsor did so without filing an amendment. Petitioners assert that this led to some of the non-tenants being provided with discounts of up to approximately 60% of the prices listed for non-tenants in the original offering plan, and approximately 45% less than prices listed for tenants in the original offering plan. As previously noted, the offering plan, as presented, stated that the original purchasing tenants were to receive a 25% discount off of the market price of the apartment units. Petitioners assert that after July 22, 2008, non-tenant purchasers were given a far better discount than the original tenant-purchasers.

Petitioners allege that, due to the language in the offering plan preventing discriminatory inducements, purchasing tenants would never be in a situation where non-tenants were being offered prices lower than what purchasing tenants paid for the apartments. They also state that there was no language in the offering plan which would enable the sponsor to greatly reduce prices to non-tenants without proper disclosure to

* 7] ,
purchasing tenants. Simply put, had there been proper disclosure, it is likely that purchasing tenants would not have bought at the prices offered.

On December 21, 2008, after entering into 80 purchase agreements with non-tenants and 43 purchase agreements with tenants, the sponsor submitted the effectiveness agreement to the AG. According to petitioners, the sponsor defied the regulations when it counted some of these purchase agreements which were purchased by the sponsor's business associates. Petitioners also allege that some of the purchase agreements were signed by real estate brokers, and that those units were not sold for residency, but for resale.

The record indicates that, between the period of November 2008 through August 2009, there were multiple investigations, letters and contact between the AG, the sponsor and petitioners.

After investigating, the AG found that the sponsor violated 13 NYCRR 23.3 (k) (2) by reducing prices to non-tenants without filing an amendment of the offering plan.

In an "assurance of discontinuance" dated August 18, 2009, the AG related the following:

2. 13 NYCRR 23.3 (k) (2) provides that a sponsor must disclose that the offering prices set forth in Schedule A of the Offering Plan must be changed by a duly filed amendment to the offering plan when the change in price by Sponsor represents an across the board decrease.
3. Page 85 of the Offering Plan contains the disclosure required by 13 NYCRR 23.3 (k) (2).
4. The Offering Plan was never amended to disclose any across the board decreases in the offering prices set forth in Schedule A.

5. In or around November 2008, AG received tenant complaints alleging that Respondents failed to amend the Offering Plan to disclose decreases in purchase prices offered to non-tenant purchasers.

6. Between September 2008 and December 2008, 81 residential units were sold to non-tenant purchasers, 78 of which were sold at prices ranging between 44% and 66% below the offering prices set forth in Schedule A of the Offering Plan.

7. Based on the foregoing facts, AG finds that these price changes indicate an across the board decrease, which would have obligated Respondents to amend the Offering Plan accordingly.

The sponsor neither admitted nor denied the AG's findings. However, among other things, it agreed to pay a fine and also amend the offering plan in the future. On August 21, 2009, the AG fined the sponsor \$100,000.00 for reducing prices to non-tenants without filing an amendment to the offering plan in violation of 13 NYCRR 23.3 (k) (2).

On August 24, 2009, the AG accepted the effectiveness amendment, thereby allowing the offering plan to go into effect, and allow purchasers to close on their apartments.

Shortly thereafter, petitioners commenced this Article 78 proceeding seeking to have the AG rescind the offering plan and the effectiveness amendment, or amend the latest effectiveness amendment to allow tenants to purchase the units at a discount of 25% on the lowest price paid by a non-tenant.¹ Petitioners argue that GBL § 352-eeee.1. (b)

¹ Petitioners initiated this action with the filing of a petition dated December 21, 2009. And amended verified petition was subsequently filed, dated January 7, 2010.

requires that all sales to non-tenants which were priced lower than sales to tenants should not be considered as purchase agreements towards the offering plan, because the discounted pricing can be considered a “discriminatory inducement” towards tenants. Petitioners also allege that tenants’ spouses and children were allowed to enter into purchase agreements by which the sponsor would be violating the discriminatory inducement prohibition.

Petitioners additionally argue that the AG should be required to reject the offering plan since the building contains alleged zoning violations. Petitioners allege that certain zoning violations, such as an overbuilt penthouse and an improperly used storage space, were not disclosed by the sponsor in the offering plan, and, as such, the offering plan should not have been approved. Petitioners are concerned that, at some point in the future, the City of New York may impose fines on the building for these alleged violations, and perhaps revoke the certificate of occupancy. Petitioners also allege that there are other issues which the sponsor did not disclose in the offering plan, such as any current litigation.

Petitioners maintain that, after September 21, 2007, the sponsor harassed non-purchasing tenants with construction noise in an attempt to make them vacate their units. Petitioners also state that the sponsor raised the rent for non-purchasing tenants unconscionably. Petitioners accuse the AG of not investigating this alleged harassment or rent increases after being on notice of such. According to petitioners, these units sold to

non-tenants should not have been counted as purchase agreements since the sponsor engaged in prohibited conduct as a means to sell these apartments.

Petitioners seek a variety of relief, including either an amendment of the plan, a rescission, and a directive from the court, ordering the AG to investigate the circumstances of every unit vacancy.

The AG concluded that, by failing to include an amendment for its price reductions, the sponsor would be fined. The AG did not find that, under the Martin Act, the AG would be required to reject the offering plan on this basis. Likewise, the AG did not conclude that the sponsor would be required to offer further discounts to either tenants who already purchased or tenants who now wished to purchase at the discounted rate. With respect to the alleged apartments which were sold at discounted rates to tenants' family members, the AG notes that, even if true, these apartments cannot serve as a basis to vacate the AG's approval of the effectiveness amendment.

The AG also contends that the zoning violations were adequately disclosed, and that the court should not disturb the AG's acceptance of the plan.

With respect to the harassment allegations, the AG contends that this claim fails as a matter of law since the AG lacks the authority to reject an offering plan without a judicial determination that harassment has occurred. The AG also notes that the allegations in the amended petition regarding rent increases are pre-conversion rent increases, over which the AG has no jurisdiction.

The sponsor joins and supports the AG's cross motion to dismiss. It also argues that petitioners do not have standing to commence this proceeding and many of the new "facts" as presented in the court papers were not presented to the AG at the time of review, and therefore are not subject to review at this time. The sponsor denies any lack of disclosure, lack of compliance with the Martin Act, or illegal activity with regard to the offering plan or its effectiveness amendment.

On the date of the original filing, Vera Salnikova occupied an apartment on the 31st floor of the apartment building. Pursuant to the offering plan, during the exclusive period, Salnikova was given the option to purchase her apartment at the insider tenant price. During this exclusive period, Salnikova commenced an action, in New York Supreme Court, alleging, among other things, that the building contained zoning violations, and, as a result, she sought a preliminary injunction extending her exclusive period to buy the apartment pending potential corrections. *See Salnikova v. S & P Associates of New York, LLC*, Index No. 106905/2008 (York, J.). Salnikova also sought an order from the Court declaring that she is a rent-stabilized tenant.

The Court (York, J.) did not grant a preliminary injunction tolling Salnikova's exclusive period to buy, finding that she did not "have a likelihood of success on the merits of her rent stabilization claim." In a decision dated January 13, 2009, the Court explained that plaintiff could either purchase the apartment at the insider price, or take the risk that someone else would purchase the apartment after the exclusive period was over.

The Court maintained that the sponsor-defendants would suffer harm if they were not able to market the apartment if Salnikova did not herself even want to purchase the apartment. *See Salnikova v. S & P Associates of New York, LLC* (Sup. Ct. N.Y. Cty. January 13, 2009), York, J., Index No. 106905/2008.

In a decision dated October 13, 2009, the Court subsequently dismissed the fifth and sixth causes of action in the complaint. The Court denied Salnikova's request to be declared a rent- stabilized tenant, and found that the apartment did not have a rent- stabilized status.² Salnikova's lease purportedly expressly declared that the apartment was no longer rent stabilized. The lease also stated that the building was no longer subject to the rent stabilization law, was not rent stabilized, and that there could be future rent increases. The Court also denied Salnikova's request to extend the exclusive period to purchase her apartment. *See Salnikova v. S & P Associates of New York, LLC* (Sup. Ct. N.Y. Cty. October 13, 2009), York, J., Index No. 106905/2008).

Petitioner Petepiece was a tenant in the building on September 21, 2007. Petepiece did not exercise his right to purchase an apartment during the exclusive period. The sponsor alleges that Petepiece never contacted the sponsor with respect to issues of purchase or any other tenancy issues. Petepiece submitted an unverified the petition.

² As provided for in GBL § 352-eeee (2) (c) (iii), non- purchasing tenants who reside in apartments subject to government regulation, "shall continue to be subject thereto" after a non- eviction conversion, and these government regulations protect tenants. The offering plan contains this provision for these rent stabilized tenants, should there be any.

Discussion

In the context of an Article 78 proceeding, courts have held that “a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious.” *Matter of Soho Alliance v. New York State Liquor Authority*, 32 A.D.3d 363, 363 (1st Dep’t 2006), citing *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222 (1974); see CPLR 7803 (3). An agency’s decision is considered arbitrary if it is “without sound basis in reason and is generally taken without regard to the facts.” *Matter of Pell*, 34 N.Y.2d at 231.

Under a non-eviction plan, “as to the tenants who were in occupancy” on the date of filing, purchase agreements shall be executed and an offering made without any “discriminatory inducements.” The Martin Act specifically provides that:

As to tenants who were in occupancy on the date a letter was issued by the attorney general accepting the plan for filing, the purchase agreement shall be executed and delivered pursuant to an offering made without discriminatory repurchase agreements or other discriminatory inducements.

GBL § 352-eeee (2)(c)(i). Discriminatory inducements, as per the statute, only apply to tenants who were in occupancy at the time of the filing of the offering plan. Although a “discriminatory inducement” is not defined in the Martin Act or in the AG Regulations, courts have explained that a sponsor may not discriminate between tenants in the process of a conversion. For example, the Court in *Conversion Equities v. Sherwood House*

Owners Corp., 151 A.D.2d 635 (2d Dep't 1989) held that the sponsor could not give one tenant a "special offer" without extending it to all tenants, holding that "[t]he provisions of General Business Law article 23-A as well as local tenant protection laws prohibit sponsors from offering tenants discriminatory inducements in the process of a conversion of a residential rental building to cooperative ownership." *Conversion Equities*, 151 A.D.2d at 637.

Petitioners and respondents interpret discriminatory inducements differently. Petitioners argue that the offering plan, as presented, led the tenants to believe that they would be receiving better and discounted prices than non-tenants. Petitioners maintain that all sales to non-tenants at prices below what tenant purchasers were offered, constitute discriminatory inducements, i.e., the tenants in occupancy were discriminated against, as a class, when non-tenants were allowed to purchase at lower prices than were offered to tenants. Because these sales to non-purchasing tenants would allegedly be discriminatory inducements, and the offering plan did not disclose the potential for these discounts, petitioners argue that the AG should not have approved the plan.

The AG contends that it followed the provisions of the Martin Act, and that its August 24, 2009 acceptance of the offering plan should not be revoked. As such, any price reductions to non-tenants after the exclusive period would not be considered discriminatory as against current tenants.

Petitioners' counsel maintains that Salnikova represents members of the tenants' committee who include tenants who were fraudulently induced to purchase apartments during the exclusive period as a result of the misleading facts, and tenants who would have purchased apartments in the building had they been afforded the same prices as non-tenants were later offered. Counsel alleges that these members were tenants in the building at the time of the filing on September 21, 2007, but, for fear of retribution, do not wish that their names be disclosed at this time.

Petitioners maintain that because a cross motion for dismissal has been made, the court should accept the fact that members of the committee do have standing, but are afraid to state their names for fear of retribution.

Despite petitioners' contentions, it is well settled that a petitioner may not proceed with an action in the absence of standing. *Stark v. Goldberg*, 297 A.D.2d 203, 204 (1st Dept 2002). "Standing is a threshold determination." *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991). The Court of Appeals has held that

[a] plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. "The existence of an injury in fact--an actual legal stake in the matter being adjudicated--ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'"

Silver v. Pataki, 96 N.Y.2d 532, 539 (2001), quoting *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d at 772.

This Article 78 proceeding is a narrow one in which the court's responsibility is solely to determine whether the AG's decision to accept the August 24, 2009 effectiveness amendment to the offering plan was rational and should be upheld. Petitioners argue, among other things, that the offering plan, as presented, should be rescinded or amended, because it constitutes a discriminatory inducement against tenants, and the zoning violations were not adequately disclosed by the sponsor. Petitioners state that the "tenant-purchasers" are members of the tenants committee who were tenants in the building at the original date of filing. Petitioners' papers consistently refer to the tenants as purchasing tenants who executed purchasing agreements during the exclusive period with no rescission rights.

Salnikova, the petitioner who verified the petition, did not purchase an apartment, was not evicted as a result of the plan, and did not sustain any damages as a result of the plan becoming effective. The offering plan repeatedly provides that in accordance with the Martin Act, no non-purchasing tenant will be evicted by reason of the conversion. In its October 2009 decision, the Court declared that Salnikova was not entitled to an extended exclusive period. Since she did not purchase an apartment before the period ended in July 2008, she is not a tenant who was potentially aggrieved by the pricing differences. Therefore, the offering plan, as approved, did not affect her. "[I]f an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved

merely by multiplying the persons a group purports to represent.” *Society of Plastics Industry, Inc. v County of Suffolk*, 77 N.Y.2d at 775. The sponsor correctly noted that no tenant who purchased an apartment has come forward as a petitioner. Because it is undisputed that Salnikova did not exercise her right to purchase during the exclusive period, she cannot, and does not, allege that she was aggrieved as a result of the AG’s approval of the offering plan.

There is also no injury posed to Salnikova by an alleged lack of disclosure of the zoning violations in the offering plan. Petitioners argue that purchasers may be subject to “substantial future costs in connection with correcting certain construction deficiencies in the building” which were not disclosed in the offering plan. Petitioners also discuss the risks to the tenant purchasers. However, as Salnikova did not buy an apartment, any potential future costs to apartment owners could not apply to her.

Due to the lack of standing, the court need not have to discuss the underlying merits of the case. The Court notes, however, that the AG’s responsibility is not to investigate zoning violations but to ensure that existing violations are disclosed by the sponsor. The AG concluded that all zoning violations were properly disclosed. However, as noted above, even if there were undisclosed zoning violations, they did not and will not affect Salnikova nor any other bona-fide tenant who did not purchase an apartment during the exclusive period.

In the amended petition, petitioners refer to tenants, such as Petepiece, who might have bought their apartments had they been offered the lower prices offered to non-tenants. However, not one tenant who did not purchase, but who claims that they might have purchased at non-tenant prices had they been given an opportunity, verified the petition. The sponsor asserts that Petepiece never contacted the sponsor with regard to any tenancy issues.³

Petepiece's and the other non-purchasing tenants' argument that they would have purchased apartments had they been given an opportunity at a discounted rate is mere speculation. The link between the offering plan's approval and a hypothetical purchase is too remote to be considered an actual injury in fact. *See Matter of Madison Square Garden, L.P. v. New York Metropolitan Transportation Authority*, 19 A.D.3d 284, 286 (1st Dept 2005) (petitioners lacked standing because "the injuries they fear . . . are not 'actual or imminent', the link between those injuries and the [defendants' action] is too attenuated, and it is speculative rather than likely that those future injuries will be redressed by annulling [the defendants' action]") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Accordingly, Petepiece, as well as the other non-

³ This argument is moot in any event. The relevant language of the Martin Act provides that the sponsor could not offer one purchasing tenant a more favorable price than another purchasing tenant. Therefore, the sponsor would not have been able to offer only certain non-purchasing tenants the non-tenant prices.

purchasing tenants who allege that they may have purchased, lack standing to proceed with this petition.

Petitioners allege that the committee members are tenant purchasers or non-tenant purchasers who may have purchased. The names of the committee members were not provided to the court. It does not appear from the record that the petitioners provided the names of these purported members to the sponsor or to the AG. The notion of due process alone would suggest that the names are required to be released so that the respondents can respond properly to the allegations.

Regardless, the Court finds that non-purchasing tenants have no “personal, real, direct or substantial” interest in the offering plan’s approval, and therefore lack standing.

GBL § 352-eeee, as implemented subsequent to *Matter of Whalen v Lefkowitz*, 36 N.Y.2d 75, 78 (1975), was designed as a way to promote conversion of buildings to cooperative or condominium status, but still provide protection for tenants against forced evictions. The condominium conversion plan in the present case is a non-eviction plan, pursuant to GBL § 352-eeee. In a non-eviction plan, if a tenant elects not to purchase their, they may remain in their apartments, with a lease, paying rent at the current market value of the rent for that building. “A sponsor who files a non-eviction plan is permanently barred from evicting non-purchasing tenants based on ‘expiration of

tenancy' and from subjecting such tenants to unconscionable increases." *Paikoff v. Harris*, 185 Misc. 2d 372, 377 (App Term, 2d Dept 1999).⁴

Also, subsequent to *Whelan*, in a non-eviction conversion plan,

All dwelling units occupied by non-purchasing tenants shall be managed by the same managing agent who manages all other dwelling units in the building or group of buildings or development. Such managing agent shall provide to non-purchasing tenants all services and facilities required by law on a non-discriminatory basis.

GBL § 352-eeee (3). Since there would be no disruption in services or facilities, non-purchasing tenants would not be affected by the conversion in this manner.

Additionally, subsequent to *Whelan*, non-eviction plans provide that 15% of units must have purchase agreements either by tenants or purchasers who intend on becoming owners/occupants. In this instance, no tenants are actually required for the offering plan to be approved; they have no legal ability to block the plan and no legal stake in the outcome. Accordingly, although tenants who purchased during the exclusive period, and any tenant subject to an eviction conversion plan, would have had standing, non-purchasing tenants do not have standing in this non-eviction conversion plan.

⁴ In accordance with GBL § 352-eeee (2) (c) (iv), the sponsor offered Salnikova a one-year rental lease on her apartment after the conversion plan went into effect and Salnikova did not purchase her apartment. Salnikova did not respond to this renewal offer, and was served with a 30-day notice of termination, which was set to expire on February 28, 2010.

Moreover, pursuant to CPLR 7804 (d), the petition in an Article 78 proceeding must be verified. *See Matter of Salahuddin v. LeFevre*, 137 A.D.2d 937, 937 (3d Dept 1988). “Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he [or she] may treat it as a nullity, provided he [or she] gives notice with due diligence to the attorney of the adverse party that he [or she] elects to do so.” *Matter of Master v. Pohanka*, 44 A.D.3d 1050, 1052 (2d Dept 2007), quoting CPLR 3022.

The sponsor states that, upon learning that the petition was verified by a person who allegedly lacked standing, the sponsor immediately rejected the petition as a nullity pursuant to CPLR 3022. In opposition to the sponsor and AG’s cross motions, petitioners submit affidavits from two tenants who cite facts as to “misleading disclosures” in connection with their purchases. However, neither one of these tenants verified the petition or alleged that they are acting on behalf of the other allegedly aggrieved tenants. They also missed the four-month statute of limitations, as they were not included in the amended petition. *See Tenants United at: 20 Magaw Place, N.Y., N.Y. 10033 v. Attorney General of State of New York*, 260 A.D.2d 161, 162 (1st Dept 1999) (“[a]lthough one tenant would have had standing to challenge the Attorney General’s acceptance of the offering plan, his time to do so ran out four months after such acceptance”) (internal citation omitted). Petitioners made no effort to amend the petition to add these new tenants as petitioners. Accordingly, based on the lack of standing, jurisdictional defects

and missed statute of limitations, the petition is denied, the cross motion is granted, and the proceeding is dismissed.

Lastly, petitioners allege that there were other “material non-disclosures and outright false statements” in the offering plan. Petitioners also argue that the non-purchasing tenants were subject to harassment by construction noise during the renovation of unoccupied units and that the sponsor imposed unconscionable rent increases on them. As, petitioners do not have standing to pursue this Article 78 petition, the Court will not address whether or not the AG should have rescinded the offering plan, or discuss the merits of these other claims.⁵

In accordance with the foregoing it is

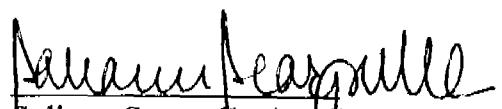
ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

⁵ Furthermore, many of these allegations apply to the sponsor itself, so an Article 78 would not be the proper avenue to proceed with these claims. Salnikova herself has already, and other tenants are free to, pursue separate litigation against the sponsor for alleged fraud, bad faith or harassment. *See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 (2002) (Martin Act did not prevent a condominium association from pursuing a private cause of action for breach of contract, among other claims).

ORDERED that the cross motions of the respondents Andrew Cuomo, as Attorney General of the State of New York and S & P Associates of New York, LLC are granted in their entirety.

Dated: New York, New York
October 1, 2010

ENTER:


Saliann Scarpulla, J.S.C.

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).