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

PRESENT: BARBARA JAFFE *J.S.C.* **PART** 5

Index Number : 114471/2010

WESTSIDE VENTURA LLC

VS

NYC DEPARTMENT OF HOUSING

Sequence Number : 001

ARTICLE 78 CPLR # 92

INDEX NO. 114471/10

MOTION DATE 3/29/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 92

The following papers, numbered 1 to 4 **were read on this motion to/for** vacate administrative determination pursuant to Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / 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: 6/1/11

JUN 01 2011

BARBARA JAFFE *J.S.C.*

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 : PART 5

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In the Matter of the Application of

WESTSIDE VENTURA LLC,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondent.

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Index No. 114471/10

Motion Date: 3/29/11
Motion Seq. No.: 001
Calendar No.: 92

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

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By notice of petition dated November 4, 2010, petitioner brings this Article 78 proceeding seeking an order annulling and reversing respondent's denial of its written protest of Emergency Repair Program (ERP) charges assessed upon it via a tax lien. Respondent opposes.

I. BACKGROUND

Pursuant to New York City Charter § 1802, the New York City Department of Housing Preservation and Development (HPD) enforces the New York City Administrative Code and the New York City Housing Maintenance Code. The Housing Maintenance Code is a

"comprehensive code of standards for decent housing maintenance" (Admin. Code § 27-2002), and it imposes on building owners a duty to comply with all of its requirements (Admin. Code § 27-2005). Violations of the Code are categorized as "Class A," or non-hazardous; "Class B," or hazardous; or "Class C," or immediately hazardous. (Admin. Code § 27-2115[d]). Lead-based paint violations are Class C violations. (Admin. Code §§ 2056.1 -2056.18).

In enforcing the Housing Maintenance Code, HPD is authorized, *inter alia*, to issue a notice of violation (NOV), which specifies the Code provision violated, the conditions constituting the violation, the class of violation, the date by which the owner must correct the violation, the date by which it must certify to HPD that it has done so, and the penalty for non-compliance. (Admin. Code § 27-2115[b], [c]). As Class C violations, lead-based paint hazards must be corrected within 21 days. (Admin. Code § 27-2115[l][1]). HPD may grant the building owner a 14-day postponement "upon a showing, made within the time set for correction in the notice, that prompt action to correct the violation has been taken but that full correction cannot be completed because of . . . inability to gain access to the dwelling unit . . . ." (Admin. Code § 27-2115[l][1]). HPD may grant the owner one additional 14-day postponement as long as the condition constituting the violation has been stabilized. (*Id.*).

HPD must inspect the property within 14 days after the owner was to correct a violation, and it must itself do so within 45 days if it discovers the owner did not. (Admin. Code § 27-2115[l][3]). Correction is effected through the ERP. (Admin. Code §§ 27-2129, 27-2144). As the cost of correction "constitute[s] a debt recoverable from the owner and a lien upon the building" (Admin. Code § 27-2128), the Department of Finance (DOF) bills the building owner for the cost of the work by including the cost as a tax lien in the next Quarterly Statement of

Account, a property tax bill and account summary sent to building owners four times a year. (Admin. Code §§ 27-2129, 2144). Pursuant to section 27-2146 of the Administrative Code, an owner may challenge the lien in writing before payment is due but may not do so on the basis of "(1) [t]he lawfulness of the repair . . . or (2) [t]he propriety and accuracy of the expense for which [it] is claimed."

On October 13, 2009, respondent issued six NOVs to petitioner for lead-based paint violations in apartment 1D of 530 West 157th Street, a building petitioner owns, specifying November 10, 2009 as the correction deadline. (Ans., Exh. A). On October 19, 2009, petitioner requested a postponement, claiming inability to access the apartment, and on November 4, 2009, respondent granted the request, providing a new correction date of November 24, 2009. (*Id.*, Exhs. C, D). On November 23, 2009, petitioner requested a second postponement, again alleging an inability to access the apartment and representing that it had hired a contractor to correct the violations. (*Id.*, Exh. E). On December 2, 2009, respondent denied petitioner's request on the ground that petitioner had failed to show that the conditions constituting violations were stabilized. (*Id.*, Exh. F).

On December 4, 2009, respondent inspected the apartment, and determining that petitioner had not corrected the violations, initiated the ERP process by issuing Open Market Order No. EA23182, an order seeking bids for the repair work. (*Id.*). By Determination of Award letter dated January 25, 2010, respondent awarded the contract to Joseph Environmental, LLC, the lowest responsible and responsive bidder. (*Id.*, Exh. G). Joseph worked in the apartment from February 1, 2010 to February 16, 2010 and sent respondent an invoice dated February 4, 2010 for $6,683.60. (*Id.*, Exh. H).

Between February 1, 2010 and February 17, 2010, the Bureau of Environmental Hazards, a part of the Division of Maintenance and Financial Operations, inspected the apartment eight times to observe the process and results of Joseph's repair work. (*Id.*, Exh. J). After each inspection, the Bureau issued a Technical Monitoring Report, none of which provides that Joseph violated safety protocol. (*Id.*). The February 1 report provides that Joseph was "setting up to start work in bathroom and Room" and that pictures of the apartment were taken. (*Id.*). The February 2, 3, 4, 5, and 16 reports detail the progress of Joseph's work, providing that all required equipment and materials, such as "respirators with HEPA filters," were present and that Joseph prepared the site with "two layers of 6 mil. poly," sealed the work entrance, and posted warning signs. (*Id.*). Although they also show that Joseph failed to provide a "designated clean changing area" or a "temporary waste storage area" and did not seal the windows or vents, the inspector still expressly concluded that "safe work practice [was] in effect" in four of the five reports, as he said nothing as to the safety of Joseph's work in the February 3 report. (*Id.*). The results of Joseph's work are reviewed favorably in the February 8 and February 17 reports. (*Id.*).

On March 3, 2010, respondent conducted a field inspection and issued a Field Inspection Report providing that the work was 100 percent complete, that the job was 100 percent approved, that "[a] change order increase of $1,207.00 has been applied," and that the final cost of the work is $7,890.60. (*Id.*, Exh. I).

By Quarterly Statement of Account dated June 11, 2010, DOF billed petitioner $9,774.48, which reflects the $7,890.60 cost of the work, $700.29 in sales tax, and a $1,183.59 administrative fee. (*Id.*, Exh. K). On June 30, 2010, petitioner submitted an Emergency Repair Charge Protest Form and supplemental letter, challenging the tax lien on the grounds that it had

made a good faith effort to correct the violations but was unable to do so before November 24, 2009 because of its inability to gain access to the apartment, that respondent failed to take this into account in denying its second postponement request, and that Joseph's work was performed in an unsafe manner. (*Id.*, Exh. L). As evidence of Joseph's alleged safety violations, petitioner annexed to the Form photographs of the work and an affidavit of the building manager, which it claims prove that Joseph failed to post warning signs, store toxic materials properly, seal work areas with plastic barriers, and require its employees to wear protective equipments. (Pet., Exh. A).

By letter dated July 6, 2010, respondent denied petitioner's protest of the ERP charges. (*Id.*, Exh M). Specifically, respondent stated that Joseph's work was inspected six times while it was in progress and that "[n]one of the inspections indicated this work was not being done according to environmental and safety regulations that govern lead abatement procedures and work," that "landlord/tenant access issues do not preclude [HPD] from performing emergency repairs," and that section 27-2146 prohibits challenges to a lien on the basis of the lawfulness of the work performed. (*Id.*).

On July 30, 2010, petitioner submitted to respondent a Freedom of Information Law (FOIL) request, seeking "[a]ll violations and inspections reports regarding alleged lead contamination at the subject premises," "[a]ll Emergency Repair Invoices for lead abatement and other work done at the subject premises between approximately February 1, 2010 and February 4, 2010," "[a]ll HPD inspection reports of the lead abatement work," and "any inspection reports created by the HPD Lead Unit." (Affirmation of David P. Haberman, Esq. in Reply, dated Jan. 21, 2011 [Haberman Aff. in Reply]). Respondent provided petitioner with the documents it

requested except for of the Determination of Award Letter, the Field Inspection Reports, and the Technical Monitoring Reports. (*Id.*, Exh. B).

II. CONTENTIONS

Petitioner contends that respondent's written decision denying its protest of ERP charges was arbitrary and capricious, as respondent refused to recognize its inability to access the apartment and evidence of unsafe work practices as valid grounds for challenging the lien. In so arguing, petitioner relies upon Administrative Code § 27-2146(a)(1), which it claims does not foreclose a challenge to ERP charges on the basis of unsafe work practices, the photographs it submitted with its protest, which it claims show that Joseph Environmental violated safety protocol, and the Technical Monitoring Reports, which it claims are too cursory to support respondent's conclusion that the work was performed safely.

In opposition, respondent contends that petitioner's inability to gain access to the apartment is not a valid basis for challenging the lien, as it must correct violations when a building owner fails to do so, regardless of the reason for the owner's failure. (Mem. of Law in Opposition, dated Jan. 12, 2011). In so arguing, respondent relies on Administrative Code § 27-2125(a), which authorizes respondent to correct Housing Maintenance Code violations, Administrative Code § 27-2115(l)(3), which provides that HPD must correct a violation if a building owner fails to do so in a timely manner, and Administrative Code § 27-2115(l)(1), which provides that respondent can only grant a second postponement if the owner shows that the condition constituting the violation is stabilized. (*Id.*). Respondent also argues that petitioner's evidence fails to show that its decision was arbitrary and capricious, as the Technical Monitoring Reports provide a reasonable basis in the record for its decision. (*Id.*).

In reply, petitioner maintains that respondent did not have a rational basis for concluding that the work was performed safely, as it failed to provide the reports in response to petitioner's FOIL request, that this failure shows that the reports are of questionable credibility, and that they thus do not rebut his photographic evidence. (Haberman Aff. in Reply).

III. ANALYSIS

Pursuant to CPLR Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. Where the petitioner challenges a determination rendered after a hearing required by law on the ground that it was not supported by substantial evidence, the action must be transferred to the appellate division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4th ed]). However, if no issues are raised involving substantial evidence, the action need not be transferred. (*Matter of Kinard v New York City Hous. Auth.*, 2009 NY Slip Op 32584[U] [Sup Ct, New York County 2009]; *Matter of Rolon v New York City Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County 2009]). Here, as no issues of substantial evidence exist, I review the proceeding to discern whether the determination reached is arbitrary or capricious.

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). In evaluating whether an administrative agency's determination is arbitrary or capricious, courts consider whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34

NY2d 222, 231 [1974]; *Matter of Kenton Assoc., Ltd v Div. of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

Here, as petitioner failed to stabilize the condition before requesting a second postponement and then failed to correct the violation by the postponed deadline, HPD's denial of petitioner's protest of the ERP charges was based on clearly applicable sections of the Administrative Code providing that HPD may not grant an additional postponement of a correction date unless the condition constituting the violation is stabilized (Admin. Code § 27-2115[l][1]) and requiring HPD to correct a lead-based paint violation when the building owner fails to do so, regardless of the reason for its failure (Admin. Code § 27-2115[l][3]). Additionally, as petitioner challenged the ERP charges on the basis of Joseph's alleged failure to comply with safety protocol and respondent's failure to grant it a second postponement despite its inability to access the apartment, respondent reasonably relied upon Administrative Code § 27-2146(a) in denying the challenge, as this section expressly prohibits challenges on the basis of the legality of the repairs.

HPD also denied petitioner's protest on the basis of the eight Technical Monitoring Reports, as four of the six created while Joseph's work was in progress expressly provide that "safe work practice [was] in effect," and none of them contain any evaluation to the contrary.

Additionally, the four reports providing that "safe work practice [was] in effect" also provide that Joseph did not complete some elements of site preparation, indicating that Joseph's failure to do so did not render its work unsafe. Although petitioner provided HPD with photographs it claims directly contradict the Technical Monitoring Reports, HPD's determination as to the credibility and weight of this conflicting evidence must remain undisturbed, as its decision is rationally supported by the Bureau of Environmental Hazards' inspections and evaluations contained in the Technical Monitoring Reports. (*See AWL Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142-43 [1st Dept 2007] [administrative determination neither arbitrary nor capricious despite conflicting evidence, as it was rationally based on record, and court could not reevaluate weight of evidence]; *Matter of Wizes v Bd. of Regents of State of New York*, 34 AD3d 902, 903 [3d Dept 2006] [same]; *Matter of Cohen v State*, 2 AD3d 522, 525 [2d Dept 2003] [same]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 1, 2011
New York, New York

JUN 01 2011

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).