M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

In the Matter of the Application of MICHELMAN LAURELTON LLC, Petitioner, For a Judgment under Article 78 of the Civil Practice Law and Rules -against- CITY OF NEW YORK, Respondent.	Index No. 27027/2011 By: **ELLIOT, J.** Date: May 16, 2012 Motion Cal. No. 26 Motion Seq. No. 1 Motion Date: February 21, 2012 Conference Date: May 15, 2012

This is an Article 78 proceeding brought to annul a determination of the City of New York Department of Buildings (DOB) and the City of New York Department of Housing Preservation and Development (HPD) which imposed Emergency Repair Program charges on petitioner's property.

On August 16, 2010, the DOB issued a notice of violation (NOV) to petitioner, the owner of premises known as 229-01 Merrick Boulevard, Queens, New York, for its alleged violation of Section 28-302.1 of the New York City Administrative Code . The NOV charged petitioner with a failure to properly maintain the wall of the building. An inspector had noticed cracks in the wall and a bulge of approximately one inch. The NOV stated:

"Remedy: Maintain exterior building wall – Provide engineer's stability report."

The NOV correctly gave the petitioner's mailing address as: "Michelman Real Estate, PO Box 401, Cedarhurst, NY 11516." However, on or about August 27, 2010, the DOB sent a wrongly addressed letter to petitioner (PO Box 104) giving notice that an inspection had disclosed "dangerous conditions" at the building and requiring immediate remedial work, the failure of which would result in the City performing the work. Attached to the letter was an "Emergency Declaration" requiring the installation of a sidewalk shed. Petitioner never received the notice (and it appears that respondent concedes same). On or about August 31, 2010, HPD sent a wrongly-addressed letter to petitioner (PO Box 104) warning that its Demolition Unit would "engage a contractor to cure the emergency condition unless you act immediately to correct the condition . . . " The letter directed petitioner to contact DOB. The Post Office returned the letter to HPD as "unclaimed," and HPD just put the letter in its file.

On September 1, 2010, Michael Murphy of HPD informed petitioner by telephone that HPD would hire a contractor to install a sidewalk bridge unless petitioner provided an engineer's stability report, and petitioner replied that it would send an engineer to the property.

On September 7, 2010, Sheldon Pulaski, a consulting engineer hired by petitioner, visited the property, and he prepared a report dated September 14, 2010, finding several defective conditions that needed repair, but concluding, based upon a "limited visual

inspection," that: "At this time the structure is not at risk of collapse but postponing the repair may create a hazardous condition in the near future." Pulaski attempted to contact Murphy at HPD, but the latter allegedly never returned his calls. By letter dated September 29, 2010, Pulaksi informed Michael Michelman, one of petitioner's principals, that his "office attempted to contact Mr. Michael Murphy . . . time after time on September 14, 2010" without receiving a return call. Petitioner also had a second report prepared by Studio 88, dated September 21, 2010, which stated that, while no visual observations which appeared to be in danger of immediate collapse were noted, rusted and deteriorated lintels and displaced and cracking brickwork were observed. Petitioner is alleged to have supplied HPD with the reports of two engineers concerning the stability of the wall which were dated prior to the cure date noted in the NOV.

On or about September 16, 2010, HPD sent a notice to Mark Contracting NY, Inc., which in effect hired the company to erect a sidewalk shed adjacent to petitioner's property, and the company proceeded to install the shed at a cost of $ 10,710. The company also charged $ 4,771.31 for three months' rent for the shed.

On or about February 14, 2011, petitioner hired Sony Home Improvement to repair the wall at a price of $ 9,000. The contractor completed the repair and, on February 28, 2011, DOB issued a "Certificate of Correction Approval."

On or about July 20, 2011, petitioner sent HPD a letter requesting that the emergency charges for the erection of the sidewalk bridge placed on its 2011/2012 real estate

tax bill be canceled, but HPD denied the request by letter dated August 3, 2011. This Article 78 proceeding ensued.

Where, as in the case at bar, a petition does not raise a substantial evidence issue, the court must determine whether the administrative determination was arbitrary, capricious, or affected by an error of law (*see Koch v Sheehan*, __AD3d__, 940 NYS2d 734 [2012]; *Matter of Senior Care Servs., Inc. v New York State Dept. of Health*, 46 AD3d 962 [2007]). Petitioner herein successfully established that, under all of the circumstances of this case, the determination of DOB and HPD to charge it for the installation of the sidewalk shed was arbitrary, capricious, and affected by error of law. The only written notice received by petitioner did not require the installation of a sidewalk shed, but only the supply of an engineer's report concerning the stability of the wall. The two written notices concerning the installation of the sidewalk shed were sent by the DOB or HPD to the wrong address and were never received by petitioner until the latter made a request under the Freedom of Information Law. Although HPD argues that Michael Murphy, one of its employees, gave petitioner actual notice by telephone about the need for a sidewalk shed, Barnet Michelman, one of petitioner's principals, who spoke to Murphy, swears: "Mr. Murphy explained to petitioner that a contractor was going to be hired to install a sidewalk bridge *unless* Petitioner provided an engineer's stability report. Petitioner advised HPD that it was going to have an engineer visit the property to verify the condition and that no sidewalk bridge should be installed before that time" (emphasis added). Respondent did not submit an affidavit from

Murphy contradicting Michelman's assertion that Murphy informed him that the installation of a sidewalk shed could be avoided by the supply of an engineer's report. Respondent did not submit an affidavit from Murphy contradicting Pulaksi's claim that his repeated phone calls to Murphy went unanswered. To the extent that respondent contends that it was permitted to perform the repairs under the emergency circumstances, same is not persuasive. While it is noted that HPD and the DOB can summarily conduct emergency repair work (*see Williams v City of New York Dept. of Hous. Preserv. & Dev.*, 46 AD3d 909 [2007]), the fact that HPD conveyed to petitioner that the installation of the sidewalk shed could be prevented by providing an engineer's stability report calls into question the genuine need to perform the emergency repairs without the requisite notice or due process to be afforded to petitioner. As such, under the circumstances, the court finds the administrative action regarding the installation charge and the subsequent lien to be arbitrary, capricious, and affected by error of law.

However, the court finds that petitioner's protest letter does not suffice as a protest to the charge for the rental period. As petitioner had an obligation to exhaust its administrative remedies with respect to the charge for the installation of the sidewalk shed prior to bringing this proceeding (and it did, as evidenced by petitioner's July 20, 2011 protest letter and subsequent denial), petitioner was also required to protest the separate and distinct charge for the three-month rental period (CPLR 7801). The court does not find that the July 20, 2011 protest suffices as a challenge to the rental charge, especially since its letter

protests "matters leading to [respondent's] decision to install emergency bridging at the above captioned premises." It is noted that petitioner had until January 3, 2012 to challenge the rental charge; however, petitioner nevertheless commenced the instant proceeding prior to the expiration of his time to so challenge same. The court notes further that no claim has been made that the continued maintenance of the shed was not required for the work undertaken by the contractor hired by petitioner to perform the work, which consisted of "masonry work, entire brick facade as per plan where necessary dated 9/27/10, brick work above lentel area - left corner change brick from midpoint as indicated on plans to chimney, replace large header coping stone above steel shutter, remove steel shutter and put same back, repair all cracks, change all lintels as per plans. Supply insulation, remove all debris."

Accordingly, the petition is granted only to the extent that petitioner's request to annul the determination of HPD and the DOB regarding the installation of the sidewalk shed, resulting in the imposition of a lien upon the property is granted, and the lien in the amount of $10,710 (and any accrued interest thereon) is discharged. The petition is otherwise denied.

Settle judgment.

J.S.C.