

**904 Tower Apt. LLC v Cuomo**

2012 NY Slip Op 32834(U)

October 26, 2012

Sup Ct, New York County

Docket Number: 105022/2010

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS  
J.S.C. Justice

PART 46

904 TOWER APARTMENT LLC and  
MADISON APARTMENT 905 LLC

INDEX NO. 105 022/2010

MOTION DATE \_\_\_\_\_

- v -

ANDREW CUOMO

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion to/for amend the petition

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

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

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

*The court grants petitioners' motion to amend their petitions, pursuant to the accompanying decision. C.P.L.R. §§ 3025(b), 7804(d).*

**FILED**

DEC 03 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/26/12

*Lucy Billings*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 46

-----x

904 TOWER APARTMENT LLC and  
MADISON APARTMENT 905 LLC,

Index No. 105022/2010

Petitioners

- against -

ANDREW CUOMO, Attorney General of the  
State of New York,

Respondent

-----x  
-----x

SAPPHIRE INVESTMENT VENTURES, LLC, and  
RUBY INVESTMENT VENTURES, LLC,

Index No. 106469/2010

Petitioners

- against -

ANDREW M. CUOMO, Attorney General of  
the State of New York,

Respondent

**FILED**

**DEC 03 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

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DECISION AND ORDER

I. BACKGROUND

These proceedings, consolidated for determination of the pending motions, concern the renovation of the historic landmark Mark Hotel at 25 East 77th Street, New York County, to convert the hotel into luxury hotel units on the lower eight floors and residential cooperative units on the upper floors. See Mark Hotel LLC v. Madison Seventy-Seventh LLC, 61 A.D.3d 140, 141-42 (1st Dep't 2009). Petitioners entered contracts to purchase three of the residential units. The proceedings challenge

determinations by respondent Attorney General of the State of New York that the nondisclosure by the cooperative corporation's sponsor of more than \$23,000,000 in mortgages encumbering the property did not constitute an omission materially adverse to petitioners, entitling them to rescind their contracts.

Petitioners move to amend their petitions to request alternative relief in the form of a remand to respondent for consideration of new evidence regarding the financing of the Mark Hotel renovation. The proposed amended petitions also request, in the event of a remand, that respondent require the sponsor to return petitioners' deposits for the units to an escrow account pending respondent's determination after consideration of the new evidence. C.P.L.R. §§ 3025(b), 7804(d).

The new evidence consists of admissions by the sponsor's principals and affiliates through their complaint in Mark Hotel LLC v. Anglo Irish Bank Corporation Limited, Index No. 652422/2010 (Sup. Ct. N.Y. Co. filed Dec. 30, 2010), which, petitioners claim, demonstrate that the \$23,000,000 was but a small part of the renovation's concealed and precarious financing that the sponsor was obligated to disclose through amendments to its cooperative offering plan. Petitioners further claim that the sponsor's prior concealment of this financing prevented them from presenting the full scope and materiality of the sponsor's nondisclosures of information adverse to petitioner's interests, to support rescission of the purchase agreements. Petitioners contend that the additional financing further jeopardized the

Mark Hotel's renovation and projected operation, because the financing depended on renovations at two other hotels and required repayment of over \$700,000,000 in loans, which could not be repaid through the Mark Hotel's operation. According to petitioners, the sponsor's principals and affiliates already had defaulted on their repayments before the sale of any condominium units.

## II. STANDARDS FOR AMENDING THE PETITION

C.P.L.R. § 3025(b) permits amendments to a petition as long as they do not unfairly surprise or otherwise substantially prejudice respondent, Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d 502, 504 (1st Dep't 2011); Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claims for relief, as alleged, are meritorious. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Watts v. Wing, 308 A.D.2d 391, 392 (1st Dep't 2003). Petitioners bear the burden to demonstrate the merit of their proposed relief through admissible evidence. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000); Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 116 (1st Dep't 1998). See Sepulveda v. Dayal, 70 A.D.3d 420, 421 (1st Dep't 2010); Spence v. Bear Stearns & Co., 264 A.D.2d 601,

602 (1st Dep't 1999).

III. THE MERITS OF THE PROPOSED RELIEF

A. A Remand to Develop the Record

Petitioners proffer new evidence to be considered upon a remand to respondent regarding the scope, materiality, and adverse nature of the sponsor's nondisclosures leading up to the scheduled closing of petitioners' agreed purchases of the cooperative units. To be entitled to the administrative adjudicator's consideration of new evidence, petitioners must demonstrate that it in fact (1) concerns the circumstances that pertained when respondent previously adjudicated their claims for rescission and a refund of their deposits, but (2) was unavailable then. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 504 (1984); Luisi v. Safir, 262 A.D.2d 47, 49-50 (1st Dep't 1999). See Rizzo v. New York State Div. of Hous. & Community Renewal, 6 N.Y.3d 104, 110-11 (2005); Matter of Washington, 100 N.Y.2d 873, 876 (2003); Douglaston Civic Assn. v. Galvin, 36 N.Y.2d 1, 8-9 (1974); Auringer v. Department of Bldgs. v. City of N.Y., 24 A.D.3d 162, 163-64 (1st Dep't 2005).

Petitioners urge the salutary purpose of allowing fuller development of the administrative record through the new evidence, but do not address whether they or respondent bore the burden to develop the record in the first instance. See Ryan v. New York Tel. Co., 62 N.Y.2d at 504; Douglaston Civic Assn. v. Galvin, 36 N.Y.2d at 9; Magier v. Abrams, 162 A.D.2d 244, 245 (1st Dep't 1990); 140 W. 4th St. Corp. v. Abrams, 152 A.D.2d 847

(1st Dep't 1989). Petitioners contend that the sponsor's prior concealment of encumbrances on the hotel property far exceeding the undisclosed \$23,000,000 in mortgages previously prevented petitioners from presenting this further nondisclosure. See Douqlaston Civic Assn. v. Galvin, 36 N.Y.2d at 9. Yet they do not answer the question as to what efforts they previously (1) bore the burden to undertake and (2) did undertake, to uncover these concealed facts.

Respondent, however, does not now contest that petitioners state a claim of entitlement to the additional relief proposed: remanding the proceeding for consideration of new evidence. Respondent simply cautions that the court may not consider the evidence in determining the merits of the petition, since the challenged administrative determination was not based on this new evidence. Luisi v. Safir, 262 A.D.2d at 50. See Rizzo v. New York State Div. of Hous. & Community Renewal, 6 N.Y.3d at 110; ADC Contr. & Constr. Corp. v. New York City Dept. of Design & Constr., 25 A.D.3d 488, 489 (1st Dep't 2006); Kirmayer v. New York State Dept. of Civ. Serv., 24 A.D.3d 850, 852 (3d Dep't 2005); Poster v. Strough, 299 A.D.2d 127, 142-43 (2d Dep't 2002). Its irrelevance to the merits of the current petition, however, does not negate its relevance to the administrative determination. The principal issues before respondent were and still would be, in the event of a remand, the extent of the sponsor's nondisclosures regarding encumbrances on the Mark Hotel property, their attendant risks and materiality to petitioners'

agreements to purchase units in the hotel, and the extent to which the encumbrances adversely affected petitioners' interests in the transactions.

In fact, the principal basis for respondent's prior conclusion that the sponsor's nondisclosure of the \$23,000,000 in encumbrances did not amount to a materially adverse omission was that these encumbrances were subordinate to the rights of the cooperative leasehold, the cooperative corporation, and each cooperative unit owner. See 13 N.Y.C.R.R. §§ 17.5(a), 18.5(a), 21.1(b)(2) and (3), 21.5(a)(6), 22.1(b); Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 18 N.Y.3d 341, 350 (2011); Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d 236, 243 (2009); Council for Owner Occupied Hous. v. Abrams, 72 N.Y.2d 553, 557 (1988); State of New York v. Rachmani Corp., 71 N.Y.2d 718, 726-27 (1988). Under New York General Business Law § 352-e(1)(b), which in a cooperative conversion requires disclosure of all mortgages' essential terms, the various other encumbrances or financing arrangements petitioners have uncovered raise questions closely related to the question respondent's prior conclusion addressed. See 13 N.Y.C.R.R. §§ 21.2(c)(3)(ii)(m) and (iv)(e), 21.3(q), 21.4(b); Council for Owner Occupied Hous. v. Abrams, 72 N.Y.2d at 557; State of New York v. Rachmani Corp., 71 N.Y.2d at 726-27; East Midtown Plaza Hous. Co., Inc. v. Cuomo, 85 A.D.3d 485 (1st Dep't 2011); Academy St. Assoc. v. Spitzer, 50 A.D.3d 271, 272 (1st Dep't 2008). For example: Is this financing similarly subordinate? If so, does that subordination adequately

protect petitioners? For these or other persuasive reasons, would the financing be immaterial to or not adversely affect the purchase of a unit in the Mark Hotel? E.g., Kralik v. 239 E. 79th St. Owners Corp., 5 N.Y.3d 54, 59 (2005); Council for Owner Occupied Hous. v. Abrams, 72 N.Y.2d at 557; State of New York v. Rachmani Corp., 71 N.Y.2d at 726-27; Jacobs Private Equity, LLC v. 450 Park LLC, 22 A.D.3d 347 (1st Dep't 2005). See Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 18 N.Y.3d at 350; Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d at 243; Academy St. Assoc. v. Spitzer, 50 A.D.3d at 272; State of New York v. Manhattan View Dev., 191 A.D.2d 259 (1st Dep't 1993).

B. A Return of the Deposit to an Escrow Account

Once a determination regarding the disposition of a deposit or downpayment on the purchase of a cooperative unit is pending before the Attorney General, he is authorized to require that the funds be held in escrow. N.Y. Gen. Bus. Law §§ 352-e(2-b), 352-h; 13 N.Y.C.R.R. § 21.3(1)(3)(viii). No statute, regulation, or provision of petitioners' Purchase Agreements § 4 expressly authorizes the court, however, to order respondent to require the sponsor's return of the funds to an escrow account, particularly after he previously released the funds to the sponsor pursuant to his prior determination. Aff. of David A. Pellegrino Ex. G (Aff. of Sol Israel), Ex. 2, at 2; Aff. of Y. David Scharf Ex. 9 (Aff. of Jerome Tarnoff), Ex. 6A, at 2; N.Y. Gen. Bus. Law §§ 352-e(2-b), 352-h; 13 N.Y.C.R.R. § 21.3(1)(3). See East Midtown Plaza

Hous. Co., Inc. v. Cuomo, 85 A.D.3d at 486.

Moreover, petitioners have not sought to join the sponsor in this proceeding. Even were the court to order respondent to require the sponsor's payment of petitioners' deposits into escrow, rather than the court directly ordering the sponsor to return the funds, the relief granted by the court obviously would impact the sponsor, without providing it an opportunity to be heard on the issue. Martin v. Ronan, 47 N.Y.2d 486, 490-91 (1979); 27th St. Block Assn. v. Dormitory Auth. of State of N.Y., 302 A.D.2d 155, 160-61 (1st Dep't 2002); McGuinn v. City of New York, 219 A.D.2d 489, 490 (1st Dep't 1995); Best Payphones, Inc. v. Public Serv. Commn., 34 A.D.3d 1068, 1069-70 (3d Dep't 2006). See City of New York v. Long Is. Airports Limousine Serv. Corp., 48 N.Y.2d 469, 475 (1979); Ferrando v. New York City Bd. of Stds. & Appeals, 12 A.D.3d 287, 288 (1st Dep't 2004); Ogbunugafor v. New York State Educ. Dept., 279 A.D.2d 738, 739 (3d Dep't 2001); Manupella v. Troy City Zoning Bd. of Appeals, 272 A.D.3d 761, 763 (3d Dep't 2000). Upon any remand, however, the sponsor may be joined in the further administrative proceedings, before the Attorney General decides whether to require payments into an escrow account. See City of New York v. Long Is. Airports Limousine Serv. Corp., 48 N.Y.2d at 476; Martin v. Ronan, 47 N.Y.2d at 491-92; 27th St. Block Assn. v. Dormitory Auth. of State of N.Y., 302 A.D.2d at 162-63; Hitchcock v. Boyack, 256 A.D.2d 842, 844 (3d Dep't 1998).

Petitioners' delay in seeking this component of relief

suggests a recognition that the relief is respondent's province in any administrative proceedings before respondent. See East Midtown Plaza Hous. Co., Inc. v. Cuomo, 85 A.D.3d at 486; Dunlop Dev. Corp. v. Spitzer, 26 A.D.3d 180, 181 (1st Dep't 2006).

While the remand to develop the administrative record with new evidence necessarily awaited the availability of that evidence, petitioners have known since they received respondent's prior determination that their deposits were subject to release to the sponsor. Significantly, petitioners have not shown through any evidence, let alone admissible evidence, that recovery of their deposits from the sponsor is more likely if respondent requires their pre-determination payment into escrow, rather than if the court orders payment at the conclusion of these proceedings or respondent does so at the conclusion of further administrative proceedings. If petitioners do make that claim, it is a factor respondent may consider in deciding, pursuant to his authority, whether to require payments into escrow.

Both the timing and the nature of this requested relief indicate that it is less essential than petitioners' primary objective of establishing entitlement to their deposits. It may be better framed, in conjunction with the development of the administrative record through new evidence, as another, collateral purpose of a remand: while the record is developed, and pending respondent's further determination regarding the disposition of deposits, to require that they again be held in escrow.

#### IV. THE ABSENCE OF PREJUDICE TO RESPONDENT

Insofar as petitioners may have delayed in seeking to add the proposed forms of relief, delay alone, without prejudice to respondent, does not bar the amendments. Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d at 504; Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d at 655; Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 354-55. Respondent articulates no specific prejudice, nor does the court discern any. He will have a full opportunity to contest the proposed forms of relief through an answer or a motion to dismiss these claims. Even if the court grants a remand, respondent then would exercise his broad discretion in conducting the new administrative proceedings: the evidentiary burdens and scope, the procedures for parties to present their evidence, and any interim relief pertaining to the disposition of petitioners' deposits. See East Midtown Plaza Hous. Co., Inc. v. Cuomo, 85 A.D.3d at 486; Dunlop Dev. Corp. v. Spitzer, 26 A.D.3d at 181.

#### V. DISPOSITION

For all the above reasons, the court grants petitioners' motions to amend their petitions to request the alternative relief set forth in their proposed Amended Verified Petitions. C.P.L.R. § 3025(b), 7804(d). These Amended Verified Petitions are considered filed and served when filed and served in connection with these motions. Respondent shall serve any answer to the amended petitions within 20 days after service of this

order with notice of entry. See C.P.L.R. §§ 3012(a), 3025(d), 7804(c). Petitioners shall serve any reply within 20 days after service of an answer. See C.P.L.R. §§ 3012(a), 7804(c) and (d). After expiration of the period to answer or reply, if applicable, petitioners may set a hearing on the amended petitions by a notice of the amended petitions or by an order to show cause, in which event the parties are to deliver their answers to the amended petitions and any replies to the court at 71 Thomas Street, Room 204, and the court, after a further hearing, will determine the extent of relief to be granted. C.P.L.R. §§ 7803, 7806.

DATED: October 26, 2012



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**FILED**  
DEC 03 2012  
NEW YORK  
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