SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

FIONA CAMPBELL STONE, VLAD TEICHBERG, JASON BECKFORD, NICOLAI HAUPT, STEPHEN A. WESTBROOK, WILLIAN FOSTER, PETER ALEKSA and IL J. CHOI,

Petitioners,

Index No. 100534/2014

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY LOFT BOARD,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioners bring the instant petition pursuant the Civil Practice Law and Rules ("CPLR") § 3001 and Article 78 seeking to vacate, in part, an Order made by respondent the New York City Loft Board (the "Loft Board") regarding three applications filed with the Loft Board by various occupants of the buildings located at 13 and 15 Thames Street, Brooklyn, New York and for a declaratory judgment that Respondent's violated the New York State Open Meetings Law. Respondent cross-moves for an Order pursuant to CPLR § 3211(a)(2), (3), (7) and (10) dismissing the petition on the grounds that the petitioners lack standing, failed to name a

necessary party, the petition fails to state a cause of action and this court lacks subject matter jurisdiction to hear the petition. For the reasons set forth below, respondent's cross-motion is only granted in part and it is ordered to answer the remaining claims in the petition within thirty days.

The relevant facts are as follows. Petitioners are residents in the buildings located at 13 and 15 Thames Street, Brooklyn, NY (the "buildings"). 13 Thames Street ("13 Thames") and 15 Thames Street ("15 Thames") are two "mirror image" buildings with similar architectural features, sharing a common wall and utilities, each located on a separate parcel of real property zoned for light manufacturing and that formerly was operated as a nut packing factory. The buildings are each three stories tall and there is one housing unit located on each floor of each building. The housing units located in 13 Thames are denominated 1W, 2W and 3W and the housing units located in 15 Thames are denominated 1E, 2E and 3E. Respondent Loft Board is a New York City agency created by Multiple Dwelling Law ("MDL") Article 7-C (the "Loft Law") that is responsible for administering the provisions of the Loft Law and that has the authority to adopt rules and regulations to implement those provisions.

On or about December 13, 2010, various tenants in the buildings, including petitioner Il J. Choi (collectively referred to herein as the "Tenants"), filed an application with the Loft Board seeking a determination that: (1) 13 and 15 Thames constitute a horizontal interim multiple dwelling covered by the Loft Law pursuant to MDL § 281(5); (2) 13 and 15 Thames contain six units, three in each building, one on each of the first, second and third floors in both of the buildings; and (3) the applicants are protected occupants of their respective units, which was assigned Loft Board Docket Number TR-0842 ("TR-0842") (herein referred to as the "Coverage

Application"). Thereafter, on April 21, 2011, petitioner Fiona Campbell Stone filed an application with the Loft Board seeking coverage rights for herself, petitioners Vald Teichberg, Jason Beckford, Nicolai Haupt, Stephen A. WestBrook, William Foster, Peter Aleksa and non-parties Bernard Walker and Arik MacAndreas ("Unit 1W Petitioners") as protected occupants of Unit 1W under the Loft Law, which was assigned Loft Board Docket Number TR-0889 ("TR-0889") (hereinafter referred to as the "Unit 1W Coverage Application").

On June 21, 2011, the buildings were sold. Specifically, 13 Thames was sold to 13 Thames Realty Inc. ("13 Realty") and 15 Thames was sold to 15 Thames Street Realty Inc. ("15 Realty"). Thereafter, on January 27, 2012, the Loft Board registered the buildings as two separate interim multiple dwelling ("IMD") buildings. Shortly after the buildings were registered as IMD buildings, on February 8, 2012, petitioners herein filed another application with the Loft Board seeking a finding that the buildings owners failed to comply with the legalization deadlines pursuant to MDL § 284(1) and § 2-01(a) of Title 29 of the RCNY, which was assigned Loft Board Docket Number TN-0220 ("TN-0220") (hereinafter referred to as the "Code Compliance Application").

On or about June 26, 2012, the Loft Board transferred the Code Compliance Application, the Coverage Application and the Unit 1W Coverage Application to the Office of Administrative Trials and Hearings ("OATH"). OATH consolidated the three applications (collectively "the Applications") and assigned them to be heard by Administrative Law Judge John B. Spooner ("ALJ Spooner"). After the Applications had been transferred to OATH, on or about January 29, 2013, tenants of Units 1E, 2E, 3E and 2W entered into a Stipulation of Partial Settlement ("Stipulation I") with 13 Realty and 15 Realty in which the parties agreed that said tenants were

protected occupants under the Loft Law of their respective units. Additionally, at the hearing before ALJ Spooner on February 1, 2013, the Unit 1W Petitioners and 13 Realty and 15 Realty stipulated that the Unit 1W Petitioners were protected occupants of Unit 1W ("Stipulation II"). Further, the parities stipulated that Bernard Walker and Arik MacAndreas's coverage claims, as part of the Unit 1W Coverage Application, would be dismissed without prejudice.

On February 22, 2013, the buildings were sold to yet another owner. Specifically, Thames Street Lofts, LLC ("Thames Lofts") purchased 13 Thames and Thames Holdings LLC ("Thames Holdings") purchased 15 Thames.

On March 6, 2013, ALJ Spooner issued a Report and Recommendation on the Applications and on March 21, 2013, he issued his Amended Report and Recommendation (the "Amended Report"). In the Amended Report, ALJ Spooner recommended that the Loft Board find: (1) the buildings are a horizontal multiple dwelling; (2) the 16 tenants named in Stipulation I and Stipulation II are protected occupants; and (3) the owners are not in compliance with the legalization deadlines, pursuant to MDL § 284(1), and are subject to fines.

While the Applications were pending in front of the Loft Board, on May 2, 2013, petitioners Jason Beckford, Peter Aleksa and Stephen A. Westbrook (collectively "Global Plaintiffs") commenced an action against, *inter alia*, the City of New York, Michael Bloomberg, Raymond Kelly, Robert LiMandri, Ira Gluckman ("City Defendants") to challenge partial vacate orders that were issued by the Department of Buildings ("DOB") for the entire first floors of the buildings back in May of 2011, which still had not been lifted (hereinafter referred to as the ("Global Action"). Specifically, the vacate orders called for Unit 1W and 1E to be vacated "due [to] imminent danger to life or public safety." In their complaint, the Global Plaintiffs alleged

that they owned and ran a media company, Global Revolution TV from the first floor of the buildings. In that action, the City Defendants moved to dismiss the action on the grounds that: (1) plaintiffs lacked standing; (2) plaintiffs were time-barred from challenging the Vacate Orders; and (3) plaintiff failed to state a cause of action for the alleged violations of their First, Fourth and Fourteenth Amendment rights. On March 14, 2014, the Honorable J. Jimenez-Salt granted the City Defendants' motion to dismiss. Global Plaintiffs appealed the decision and the case is currently pending before the Appellate Division, Second Department.

On January 13, 2014, the Loft Board notified all the affected parties, including petitioners herein, of its proposed order on the Applications (the "Proposed Order") that would be presented to the Loft Board for a final determination during its January 16, 2014 Board meeting. At the Board meeting, when the Loft Board reached the Proposed Order, one of its members declared that because "related litigation" existed between petitioners and the City, the Loft Board would go into executive session to discuss the Proposed Order. After the executive session, the Loft Board accepted the Proposed Order in its entirety resulting in Loft Board Order Number 4225 (the "Order"). In the Order, the Loft Board accepted ALJ Spooner's findings that (1) the buildings are a horizontal multiple dwelling with six units; and (2) the buildings' owners are not in compliance with the code compliance deadlines set forth in MDL § 284. However, notwithstanding Stipulation II, the Loft Board did "not accept the finding that the First Floor Tenants [the Unit 1W Petitioners] are protected occupants of 13 Thames Street." Specifically, the Loft Board found that it could not accept the stipulation between the buildings' owners and the Unit 1W Petitioners that the Unit 1W Petitioners were protected occupants under the Loft Law as "the MDL expressly prohibits seven unrelated persons to maintain one unit as a common

household." Thus, the Loft Board remanded the Unit 1W Coverage Application back to OATH for further findings of fact consistent with the Order. Additionally, although the Loft Board also determined that the owners of the buildings failed to meet the code compliance deadlines, the Loft Board determined not to impose fines on the owners. Specifically, the Loft Board stated as follows:

> In their application the [Unit 1W Petitioners] who filed this application for failure to meet the code compliance deadlines did not seek fines. At the hearing, counsel for the [Unit 1W Petitioners] stated that "the entire reason we brought this application is to motivate the owner to restore the tenants to possession." Accordingly, the Loft Board will not impose fines at this time.

Petitioners now bring the instant petition to challenge the right of the Loft Board to convene in executive session to consider the Proposed Order and to challenge the Order to the extent it rejected the recommendation of ALJ Spooner that the Loft Board impose the maximum fine allowed by law for each violation of the code compliance timetable committed by the owner of the buildings and failed to adopt the recommendation that petitioners herein are covered occupants under the Loft Law. The Loft Board cross-moves to dismiss the petition on the grounds that the petitioners do not have standing to challenge the non-issuance of fines on the buildings' owners, petitioners failed to join the buildings' owners as a necessary party, the petition fails to state a cause of action and this court does not have subject matter jurisdiction over the portion of the petition seeking a declaration that the Unit 1W Petitioners are protected occupants of Unit 1W on the ground that they have not exhausted their administrative remedies.

As an initial matter, the court finds that the portion of the petition seeking to annul the Loft Board's refusal to adopt ALJ Spooner's finding that Unit 1W Petitioners are protected occupants under the Loft Law and remanding the Unit 1W Coverage Application back to OATH

must be dismissed as premature. "It is hornbook law that 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." *Watergate II Apts v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). Here, there has been no final determination as to whether the Unit 1W Petitioners are protected occupants of Unit 1W as the Unit 1W Coverage Application has been remanded back to OATH for further fact finding. Thus, as no final determination has been made on said application, any challenge as to their status as covered occupants is premature.

However, respondent's cross-motion to dismiss that portion of the petition challenging the non-imposition of fines for lack of standing is denied as this court finds that petitioners have standing to bring their claims challenging the Loft Board's determination not to impose fines against the buildings owners. The two-part test for determining standing is well established. First, in order to establish standing, petitioners "must show 'injury in fact,' meaning that [petitioners] will actually be harmed by the challenged administrative action." *New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). "As the term itself implies, the injury must be more than conjectural." *Id.* "Second, the injury [petitioners] assert must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Id.*; *see also Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773-774 (1991). Here, petitioners have demonstrated an injury in fact as the failure of the Loft Board to impose penalties on the buildings' owners subverts the rights of the petitioners to Loft Law protection, most notably, the right to occupancy of a premises that is not hazardous to their health and safety. By not imposing fines, the Loft Board's finding that the buildings' owners are out of compliance becomes, in essence, meaningless. If the owners can

continue to not comply with the Loft Law without any penalty, there is no incentive for them to come into compliance and ensure that the buildings are safe for residential use. Thus, the court finds that this is a sufficient injury in fact to give the petitioners standing to challenge the Loft Board's decision not to impose fines. Additionally, this injury clearly falls within the zone of interests sought to be protected by the Loft Law. In 1982, the New York State Legislature enacted the Loft Law to protect the health, safety and general welfare of the public. Specifically, the Legislature stated that

> a serious public emergency exist[ed] in the housing of a considerable number of persons...created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with the applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards; that many such buildings [did] not conform to minimum standards for health, safety and fire protection; that housing maintenance services essential to maintain health, safety and fire protection [were] not being provided in many such buildings...the intervention of the state and local governments is necessary to effectuate legalization...of the present illegal living arrangements...the provisions of this article are necessary and designed to protect the public health, safety and general welfare.

MDL § 280. Here, the continued use of a commercial loft building for residential use without compliance with the applicable building codes and laws is the exact injury petitioners herein face. Thus, clearly petitioners' injury falls within the statutory protections of the Loft Law.

Additionally, respondent's cross-motion to dismiss for failure to join a necessary party is denied. However, as set forth below, this court finds that the buildings' current owners are necessary parties and should be joined in the present action. Pursuant to CPLR § 1001(a), a person "who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." "When a person who should be joined under [CPLR § 1001(a)] has not been made

a party and is subject to the jurisdiction of the court, the court shall order him summoned." CPLR § 1001(b).

In the present case, the court finds that the buildings' owners may be inequitably affected by a judgment in this action and, as such, directs that they be joined in this matter as no party has presented any evidence demonstrating that they are not subject to the jurisdiction of the court. Petitioners seek a judgment annulling the Loft Board's determination not to impose fines on the buildings' owners for failing to be in compliance with the Loft Law's set deadlines. Thus, clearly the buildings' owners might be adversely affected if this court overturns the Loft Board's decision to not impose fines on them and should be made a party to this action. To the extent respondent argues that the buildings' owners cannot be joined at this time as the statute of limitations has expired and, as such, they are not subject to the jurisdiction of this court, such contention is without merit. The Court of Appeals has made clear that "[a] statue of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any remedy from a defendant." *Windy Ridge Farm v. Assessor of Town of Shandaken*, 11 N.Y.3d 725, 727 (2008).

Finally, the remainder of respondent's cross-motion to dismiss petitioners' first, second, third and fifth causes of action on the ground that they fail to state a cause of action is denied. Respondents contention that petitioners' first, second, third and fifth causes of action fail as the Loft Board properly conducted an executive session regarding the subject buildings prior to voting on the Order is unavailing to warrant dismissal at this time. Such argument goes to the merits of the claims and not to whether petitioners have stated a claim in the first instance. Thus, such arguments need only be addressed when reviewing the petition on its merits.

Based on the foregoing, it is hereby

ORDERED that respondent's cross-motion is granted solely to the extent that the portion of the petition seeking to annul the Loft Board's refusal to adopt ALJ Spooner's recommendation that Unit 1W Petitioners are protected occupants and remanding the Unit 1W Coverage Application back to OATH for further fact finding is hereby dismissed as premature; and it is further

ORDERED that the cross-motion is otherwise denied; and it is further

ORDERED that petitioner is directed to summon the buildings' owners to this proceeding; and it is further

ORDERED that respondent is directed to answer the remaining claims in the petition within thirty days of the date of this decision. This constitutes the decision and order of the court.

Dated: 9/4/14

Enter: _____
J.S.C.