

**620 W. 182nd St Hgts. Assoc. LLC v Department of
Hous. Preserv. & Dev. of the City of N.Y.**

2016 NY Slip Op 31392(U)

July 20, 2016

Supreme Court, New York County

Docket Number: 163136/2015

Judge: Cynthia S. Kern

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

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620 WEST 182ND ST HEIGHTS ASSOCIATES LLC,

Petitioner,

DECISION/ORDER
Index No. 163136/2015

-against-

(Action #1)

DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

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HON. CYNTHIA KERN, J.:

Petitioner 620 West 182nd St Heights Associates LLC commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to vacate respondent Department of Housing Preservation and Development of the City of New York's "Alternative Enforcement Order to Correct" for the building located at 602 West 182nd Street, New York, New York (the "building"). For the reasons set forth below, the petition is granted in part and denied in part.

The relevant facts are as follows. The building, which is owned by petitioner, was entered into respondent's Alternative Enforcement Program on or about February 2, 2015. The Alternative Enforcement Program was created in 2007 by the City Council's amendment of the Housing Maintenance Code. Intended to identify and remedy the most distressed residential buildings in the City of New York, the Alternative Enforcement Program authorizes respondent to conduct a building-wide inspection and to compel building owners to substantially correct existing violations within four months and repair certain underlying conditions. Pursuant to Housing Maintenance Code § 27-2153,

After such building-wide inspection is completed, the department shall issue an order to such owner to correct existing violations of this code and the multiple dwelling law and any new violations written since the notification of the owner...and repair the related underlying conditions as shall be specified in such order...For purposes of this article, a "related underlying condition" shall mean a physical defect or failure of a building system that is

causing or has caused a violation, such as, but not limited to, a structural defect, or failure of a heating or plumbing system.

The building had 93 outstanding class "B" and "C" violations when it was selected for participation in the Alternative Enforcement Program in February 2015. Pursuant to the rules of the Alternative Enforcement Program, petitioner requested that the building be discharged from the Alternative Enforcement Program. Respondent inspected the building on or about March 31, 2015, April 28, 2015 and May 22, 2015, but did not discharge the building from the Alternative Enforcement Program as respondent found that petitioner had not sufficiently corrected the outstanding violations. Petitioner again requested that the building be discharged from the Alternative Enforcement Program, leading to inspections on June 3, 2015, June 8, 2015 and June 12, 2015. Respondent again did not discharge the building from the Alternative Enforcement Program as respondent found that petitioner had not sufficiently corrected the outstanding violations. The inspections on March 31, 2015, June 3, 2015 and June 8, 2015 were conducted by Construction Project Manager Pasquale Dellituri ("Dellituri"), who also visited the premises on April 10, 2015 and February 9, 2016. Based on Dellituri's inspection of the premises on February 9, 2016, several new violations were issued.

An Alternative Enforcement Order to Correct (the "Order"), based on recommendations from Dellituri, was posted on or about September 1, 2015. The Order requires petitioner to correct existing violations and to correct the following underlying conditions: "replace domestic water supply," "replace waste lines," "re-wire entire building," "replace floor covering in apts [sic]," "replace defective floor joists throughout" and "replace windows." Thereafter, petitioner requested clarification of the Order. On or about February 26, 2016, respondent sent petitioner a letter that allegedly clarified the Order. In the letter, respondent stated that all wood windows in the building must be replaced with aluminum windows and that defective aluminum windows must be repaired, that fuse boxes must be replaced with circuit breakers and that Ground Fault Circuit Interrupters must be installed in apartments without them, that the floor joists in the kitchens and bathrooms of apartments 1A, 1B, 1C, 2A, 2C, 3B, 3C, 4C, 5A, 5B and 5C and the

corresponding floor covering must be replaced, that the water supply line in the building must be replaced in its entirety and that all branches and lead bends of the waste lines in the building must be replaced.

On March 17, 2016, Alex Moussavi ("Moussavi"), a licensed professional engineer, responded to respondent's February 26, 2016 letter. Moussavi stated that he did not observe any excessive sloping or sagging of the floor indicating a structural defect, that he did not observe any evidence of leaks indicating problems with the water pipes and that he did not observe any evidence of chronic waste line leaks. On May 30, 2016, Moussavi submitted a more detailed report to petitioner. Moussavi's report states his opinion that the Order's requirement to replace defective floor joists and floor covering was inappropriate as "[a] cracked, raised or broken floor covering does not mean floor joist structural failure." a sloping floor is "normal" in a building as old as the building and it is unlikely and unsupported by evidence that the floor structure was damaged by leaks in the kitchens or bathrooms. Moussavi states that "[a] condition requires structural floor joist replacement when excessive sloping or settlement occurs in the floor where the wall-floor separation is visible and the condition is ongoing." Regarding the water supply and waste lines, Moussavi states that, in his inspection of the building, he did not observe any evidence of chronic leaking in the building's pipes, although many sections of the building's piping are old.

In an affidavit submitted in response to Moussavi's March 17, 2016 letter, Delliturri testified that the flooring was in such poor condition "that [Delliturri] believed that no cure short of replacing floor joists, which the owner had not done, would be sufficient to address the root cause of the problem." Based on the condition of flooring, including the sloping and sagging of floors in many of the apartments, Delliturri recommended that the floor joists be replaced in those apartments' kitchens and bathrooms, where "water damage to the floor joists was most likely to have occurred." Further, Delliturri testified that there have been repeated violations of leaks and water damage, which he believes is caused by defects in the water supply and waste lines based on the pattern of violations and his "direct observations of water damage and problematic conditions in the waste lines and water supply at the subject premises."

The court first considers the portion of the Order requiring petitioner to replace the floor joists in the kitchens and bathrooms of apartments 1A, 1B, 1C, 2A, 2C, 3B, 3C, 4C, 5A, 5B and 5C and the

corresponding floor covering. On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dept 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2nd Dept 2005); see *Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) (“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the present case, the portion of the Order requiring petitioner to replace the floor joists in the kitchens of apartments 1A, 1C, 2C, 3C and 5C and the corresponding floor covering is not arbitrary and capricious as it is rationally based on violations issued for defects in the kitchen flooring of said apartments indicative of defective floor joists. Housing Maintenance Code § 27-2153 authorizes respondent to compel an owner of a building to correct underlying conditions which have caused or are causing a violation. In his affidavit, Dellituri testified that floor joists provide structural support for the flooring, but if they are rotted or damaged, “this can lead to the floor deflecting, sagging, sloping, caving in, and breaking” or to the floor’s collapse. A violation had been issued for apartment 1A for broken, sloping and sagging floors throughout the apartment. A violation had been issued for apartment 1C for a broken and sloping floor in the kitchen. Two recurring violations had been issued for apartment 2C for floor damage in the kitchen and Dellituri personally observed deflection in the kitchen floor. A violation had been issued for apartment 3C for floor damage in the kitchen and Dellituri personally observed deflection in the kitchen floor. A violation had been issued for apartment 5C for floor damage in the kitchen. Thus, based on these violations, Dellituri’s observations and testimony regarding the effect of defective floor joists on the condition of flooring, respondent had a rational basis for the portion of the Order requiring petitioner to replace the floor

joists in the kitchens of apartments 1A, 1C, 2C, 3C and 5C and the corresponding floor covering on the ground that they are underlying conditions causing said violations.

The portion of the Order requiring petitioner to replace the floor joists in the bathrooms of apartments 1A, 1C, 2A, 3C and 5C and the corresponding floor covering is not arbitrary and capricious as it is rationally based on violations issued for defects in the bathroom flooring of said apartments indicative of defective floor joists. A violation had been issued for apartment 1A for broken, sloping and sagging floors throughout the apartment. A violation had been issued for apartment 1C for a sloping ceramic tile floor in the bathroom. A violation had been issued for apartment 2A for its bathroom's "defective ceramic tile floor" and Dellituri had personally observed that the bathroom had a sinking floor. A violation had been issued for apartment 3C for a broken, defective tile floor in the bathroom and Dellituri had personally observed deflection in the bathroom floor. A violation had been issued for apartment 5C for a broken floor in the bathroom and Dellituri had personally observed that the bathroom had a raised, deflected, water-damaged floor. Thus, based on these violations, Dellituri's observations and testimony regarding the effect of defective floor joists on the condition of flooring, respondent had a rational basis for the portion of the Order requiring petitioner to replace the floor joists in the bathrooms of apartments 1A, 1C, 2A, 3C and 5C and the corresponding floor covering on the ground that they are underlying conditions causing said violations.

Petitioner's submission of the letter and report of its expert, Moussavi, is not sufficient to establish that the portions of the Order requiring petitioner to replace the floor joists in the kitchens of apartments 1A, 1C, 2C, 3C and 5C and the corresponding floor covering and to replace the floor joists in the bathrooms of apartments 1A, 1C, 2A, 3C and 5C and the corresponding floor covering are arbitrary and capricious. Although Moussavi states in his report that sloping floors are normal in a building as old as the building, Dellituri stated in his affidavit that the sloping and sagging floors for which violations were issued and which he observed are indicative of problems with the floor joists. The court need not determine which expert's opinion is correct, but only whether respondent had a rational basis for issuing the Order. The violations described above, in conjunction with Dellituri's observations and testimony that defective floor

joists can lead to floor sloping and sagging, provide a rational basis for respondent's determination that the floor joists and floor covering in the kitchens of apartments 1A, 1C, 2C, 3C and 5C and in the bathrooms of apartments 1A, 1C, 2A, 3C and 5C needed to be replaced.

However, petitioner has established that the portion of the Order requiring petitioner to replace the floor joists in the kitchens of apartments 1B, 2A, 3B, 4C, 5A and 5B and the corresponding floor covering is arbitrary and capricious. Housing Maintenance Code § 27-2153 only authorizes respondent to compel an owner of a building to correct underlying conditions which have caused or are causing a violation. No violations indicative of defective floor joists in the kitchens, or any violations whatsoever regarding the condition of the flooring in the kitchens, have been issued for apartments 1B, 2A, 3B, 4C, 5A or 5B. Thus, as there is no evidence that the "underlying condition" of defective floor joists had caused or was causing any violations in the kitchens of apartments 1B, 2A, 3B, 4C, 5A and 5B, respondent did not have a rational basis for the portion of the Order requiring petitioner to replace the floor joists in the kitchens of apartments 1B, 2A, 3B, 4C, 5A and 5B and the corresponding floor covering.

Petitioner has also established that the portion of the Order requiring petitioner to replace the floor joists in the bathrooms of apartments 1B, 2C, 3B, 4C, 5A and 5B and the corresponding floor covering is arbitrary and capricious. No violations indicative of defective floor joists in the bathrooms, or any violations whatsoever regarding the condition of the flooring in the bathrooms, have been issued for apartments 1B, 2C, 3B, 4C, 5A or 5B. Thus, as there is no evidence that the "underlying condition" of defective floor joists had caused or was causing any violations in the bathrooms of apartments 1B, 2C, 3B, 4C, 5A and 5B, respondent did not have a rational basis for the portion of the Order requiring petitioner to replace the floor joists in the bathrooms of apartments 1B, 2C, 3B, 4C, 5A and 5B and the corresponding floor covering.

Contrary to respondent's contention, Dellituri's statement that the floor joists and floor covering in the kitchens and bathrooms should be replaced because that was "where water damage to the floor joists was most likely to have occurred" does not provide a rational basis for respondent's determination that the

floor joists and floor covering must be replaced in all of the kitchens and bathrooms as it is merely speculative.

The portion of the Order requiring petitioner to replace the water supply line is not arbitrary and capricious as it is rationally based on violations issued for leaks and water damage indicative of defects in the water supply line. Dellituri testified in his affidavit that water damage can result from the “domestic water supply...not working properly,” and that “[f]aucets that are continuously dripping or leaking usually indicate problems with branches of the water line.” Further, he testified that water damage to the ceiling can indicate problems with branches of the water line. Respondent has documented an extensive history of violations for leaks and water damage, including some violations that recurred in the same apartments despite petitioner’s repairs. Some of the violations documented include a leaking water pipe and water damage to the ceiling of apartment B3, recurring leaks and water damage in apartment 1A, recurring water damage in apartment 2A, recurring leaks in apartment 2C and recurring leaks in the bathtub faucet of apartment 5B. Moreover, Dellituri had personally observed a running faucet in the bathtub of apartment B3 indicative of a defective water line and poor water plumbing in the bathroom of apartment 2A, including a running bathtub faucet. Thus, based on these numerous violations in multiple apartments, Dellituri’s observations and testimony regarding the connection between problems with the water supply line and certain leaks and water damage, respondent had a rational basis for the portion of the Order requiring petitioner to replace the entire water supply line on the ground that it is an underlying condition causing said violations.

The portion of the Order requiring petitioner to replace all branches and lead bends of the waste line is also not arbitrary and capricious as it is rationally based on violations issued for leaks and water damage indicative of defects in the waste line. Dellituri testified in his affidavit that violations for water damage to the ceiling usually indicate a problem with the waste line. Respondent has documented an extensive history of violations for leaks and water damage indicative of problems with the waste line, including violations for a leaking waste pipe in apartment 1A, leaks indicative of waste line problems in apartment 1B, water damage to the ceiling of apartment 2B and leaks indicative of waste line problems in apartments 3B and 3C.

Further, Dellituri had personally observed an improper, patchwork repair of the waste line in the cellar. Thus, based on these violations, Dellituri's observations and testimony regarding the connection between problems with the waste line and certain leaks and water damage, respondent had a rational basis for the portion of the Order requiring petitioner to replace the branches and lead bends of the waste line on the ground that it is an underlying condition causing said violations.

Petitioner's submission of the letter and report of its expert, Moussavi, is not sufficient to establish that the portions of the Order requiring petitioner to replace the water supply line and the branches and lead bends of the waste line are arbitrary and capricious. Although Moussavi states that he did not observe "any evidence of chronic leak in the water pipes or wastepipes throughout the building" and that the pipes were operational, Dellituri testified regarding the extensive history of violations for leaks and water damage and his own observations of leaks and water damage in numerous apartments. The violations described above, in conjunction with Dellituri's observations and testimony regarding the effects of defective water supply and waste lines, provide a rational basis for respondent's determination that the water supply line and the branches and lead bends of the waste line needed to be replaced.

Petitioner's argument that Dellituri's testimony should be ignored or given little weight because he is not a licensed engineer, unlike petitioner's expert, is without merit. Petitioner has failed to cite any law or regulation requiring an inspector for respondent to be a licensed engineer. Further, petitioner's argument that Dellituri's affidavit is based on hearsay as he frequently cites observations by Prad Shah, another inspector who conducted inspections of the building and accompanied Dellituri on his February 9, 2016 inspection, and references photographs he did not take is without merit. Dellituri has provided sufficient non-hearsay evidence, based either on his own observations or on previously issued violations, to show that respondent had a rational basis for its decision to require petitioner to replace certain floor joists and floor covering, the water supply line and the branches and lead bends of the waste line.

The court finds that the issue of whether the portion of the Order requiring petitioner to replace windows and re-wire the building should be vacated is moot, as contended by respondent, as it is undisputed that petitioner has performed renovations satisfying this portion of the Order. "[T]he doctrine of mootness

is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.” *Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Comm.*, 2 N.Y.3d 727, 728-29 (2004). *See, e.g., Bederman v. Bederman*, 123 A.D.3d 1029, 1029 (2nd Dept 2014) (holding that the issue of a child’s enrollment in and ability to attend a school was rendered academic by the passage of the enrollment deadline).

In the present case, the issue of whether the portion of the Order requiring petitioner to replace windows and re-wire the building should be vacated is moot as petitioner has replaced all wood windows in the building with aluminum windows and repaired any defective aluminum windows, and has replaced fuse boxes with circuit breakers and installed Ground Fault Circuit Interrupters where necessary. Respondent concedes that petitioner’s renovations have satisfied the portion of the Order requiring petitioner to replace windows and re-wire the building. Thus, there is no remaining actual controversy regarding said portion of the Order for the court to determine.

Petitioner’s contention that the entire Order should be vacated on the ground that it is vague and overly broad is unavailing as whether an order is vague and overly broad is not a question that can be raised in an Article 78 proceeding. Pursuant to CPLR § 7803, the only questions that may be raised in an Article 78 proceeding are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Further, petitioner has failed to cite any case law holding that an order may be vacated in an Article 78 proceeding on the ground that it is vague and overly broad.

Accordingly, the petition is granted in part and denied in part. The portion of the Order requiring petitioner to replace the floor joists in the kitchens of apartments 1B, 2A, 3B, 4C, 5A and 5B and the corresponding floor covering and the portion of the Order requiring petitioner to replace the floor joists in

the bathrooms of apartments 1B, 2C, 3B, 4C, 5A and 5B and the corresponding floor covering are vacated.

The petition is otherwise denied. This constitutes the decision and order of the court.

DATE :

7/20/16


KERN, CYNTHIA S., JSC

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