Matter of WE 223 Ralph LLC v New York City Dept. of Hous. Preserv. & Dev.
2017 NY Slip Op 31394(U)
June 28, 2017
Supreme Court, New York County
Docket Number: 157148/2016
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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In the Matter of the Application of
WE 223 RALPH LLC,

Petitioner,

For a Judgment Pursuant to 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. 157148/2016
Motion Seq: 001

DECISION, ORDER & JUDGMENT
ARLENE P. BLUTH, JSC

The petition to annul respondent's determination denying petitioner's tax protest regarding emergency repair charges in connection with fire watch guard services is denied and this proceeding is dismissed.

Background

This proceeding arises out of a building owned by petitioner located at 223 Ralph Avenue, Brooklyn, New York. This four story building contains seven residential units. Respondent issued numerous violations against petitioner's building on May 21, 2015 including violations relating to fire safety. Respondent concluded that the building immediately needed a fire guard, also known as a fire watch, and respondent installed the required equipment in the building through a contractor on May 21, 2015. Respondent then charged petitioner for the fireguard services provided in petitioner's building throughout May, June and July 2015.

Petitioner challenges the charges arising out of the installation of the fire guard. Petitioner claims that respondent failed to notify petitioner of the underlying notices of violations (NOVs) as required by law, the violations were unwarranted and the violations are not supported by respondent's documentation. Petitioner argues that serving only a registered managing agent is not enough and that respondent addressed a stop work order to 323 Ralph Avenue instead of the correct address– 223 Ralph Avenue.

In opposition, respondent argues that it received numerous complaints regarding the safety and maintenance of petitioner's building and that it conducted an inspection of the building on May 21, 2015. Respondent contends that the inspection revealed immediately hazardous conditions meriting the installation of a fire guard. Respondent then issued two NOVs, both of which contained a Class C violation. Respondent argues that it complied with applicable laws in providing the emergency fire watch and that it properly mailed the NOVs to petitioner's registered managing agent. Respondent maintains that petitioner did not immediately remedy the hazardous conditions based on the alleged proof submitted by petitioner. Respondent concludes that petitioner appears to have installed fireproofing materials when it was required to provide fire watch services.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination

has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

Administrative Code § 27-2125 (Power to cause or order corrections of violations) provides that "(a) Whenever the department determines that because of any violation of this chapter of other applicable law, any dwelling or parti of its premises is dangerous to human life and safety of detrimental to health, it may (1) correct such conditions or (2) order the owner of the dwelling or other responsible party to correct such conditions."

Service Issue

Petitioner maintains that it was not properly served with the NOVs. Administrative Code § 27-2095 (Service of notices and orders) provides that:

> "(a) Except as otherwise provided in this code any notice of violation or other notice, or any order authorized or required to be served by the department under the provisions of this code shall be served in the following manner on any person or corporation to whom or which such notice or order is directed: 3[i] If service is to be made on an owner of a dwelling, by mailing a copy of such notice or order to the latest business or residence address of such owner as set forth in any registration statement filed by such owner with the department under the applicable provisions of article two of this subchapter; [ii] If service is to be made on a managing agent of any such dwelling designated under the applicable provisions of article two of this subchapter, by mailing a copy thereof to the latest business or residence address of such managing agent set forth in any such registration statement or designation filed by the owner of such dwelling. . . [c] Where a designation of a managing agent under the applicable provisions of article two of this subchapter is currently in effect as to any multiple dwelling, any notice mentioned in subdivision a of this section which is directed to the owner of such multiple dwelling shall also be directed to such managing agent, and shall be served by the department on both such owner and managing agent."

The question for this Court is whether the Administrative Code requires service on the owner when HPD serves the managing agent pursuant to Administrative Code § 27-2095(a)(3)(ii) [the provision allowing service on a managing agent]. Here, the Court finds that a plain reading of 27-2095[c] does not compel respondent to serve the owner if the managing agent was served. Instead, Section c requires that *where respondent decides to serve the owner and a managing agent is designated*, then this managing agent must also be served. It does not mandate that where the managing agent is served pursuant to (a)(3)(ii), which is what respondent did here, the owner must also be served.

If the Court were to embrace petitioner's construction of this provision, then 27-2095(a)(3)(ii) would be rendered meaningless. What would be the point of having both 27-2095(a)(3)(ii) and 27-2095[c] if respondent had to serve both the owner and the managing agent? The purpose of these regulations is to allow HPD options when serving NOVs (*see Dept. of Hous. Preservation and Dev. of City of New York v 2515 LLC*, 6 Misc3d 1039(A), 800 NYS2d 345 (Table) [Civ Ct, NY County 2005] ["27-2095(a)(3) allows for service on an owner or managing agent by mailing process to the addresses listed in MDR statement filed with DHPD"). Petitioner's argument would remove the option of serving the managing agent only; this Court declines to embrace an interpretation that would require ignoring an entire provision.

To the extent that the Stop Work Order incorrectly referenced the building as 323 Ralph Avenue (or had an incorrect description of the building), that error has no bearing on this proceeding because that order was issued by another agency (DOB).

Therefore, the Court finds that respondent properly served the registered managing agent with the NOVs to Benjamin Bottner (the managing agent) at Choice New York Management, 220 Fifth Avenue, Suite 1502, New York, New York (*see* verified answer, exh I).

Substance of the Violations

Whether petitioner installed fire-proofing materials after the issuance of the NOVs (which may have been in violation of a stop work order issued by DOB) is immaterial because petitioner did not install fire watch services as required in respondent's NOVs. Petitioner's claim that respondent should have removed the fire watch some time after May 21, 2015 fails because petitioner did not submit evidence to respondent to show compliance with the proper procedure in order to certify that the violations were corrected. Sending photos to a City Council member is not the proper way to correct violations issued by HPD. Petitioner does not argue that it provided the required fire watch services at the building and, therefore, respondent's determination to charge petitioner was not arbitrary or capricious.

Petitioner also claims that respondent cannot rely on records that respondent failed to disclose at the tax protest stage now relied upon by respondent in the instant proceeding. This claim fails because Administrative Code § 27-2146 prohibits petitioner from challenging the "lawfulness of the repair or other work done; or (2) The propriety and accuracy of the expense for which a lien is claimed, except as provided in this section." In any event, respondent has submitted a detailed accounting of its determination regarding the charges billed to petitioner (*see* exhs B, J and L). Respondent need not provide materials sufficient to satisfy petitioner in order to justify the charges against petitioner. When objecting to a charge, respondent is required

to "make a determination based on all the documentation received from the objecting owner as well as the records from the Department. The Department will then inform the objecting owner of such determination in writing, including the reasons for that decision" (28 RCNY 17-03[i]). Respondent's April 28, 2016 determinations clearly state the reasons for upholding the emergency repair charges for the NOVs.

Summary

Respondent is charged with ensuring the safety of tenants living in buildings across New York City. Part of this responsibility entails making immediate and emergency corrections to buildings. Here, petitioner has not provided a basis to conclude that respondent's actions in arranging for fire watch services and charging respondent for those services were arbitrary or capricious. Disagreeing with the necessity of the repairs is not enough to annul respondent's determination. Further, the Administrative Code strictly limits the ability of a building owner to challenge the lawfulness of work done in emergency situations like the one present in petitioner's building. In fact, prior to May 21, 2015 petitioner's building was being monitored by respondent's Tenant Harassment Prevention Task Force because of prior complaints, including concerns about improper construction procedures.

Respondent's emails discuss the fact that petitioner was attempting to renovate the entire building and that only 2 of the 7 units were occupied (including a legally blind tenant) (verified answer, exh D). Respondent stepped in and provided fire watch services when it determined that the lack of fire stopping materials compromised the safety of the tenants living in the two apartments (*id.* exh E). That determination was neither arbitrary nor capricious.

Accordingly, it is hereby

ORDERED that the petition is denied and this proceeding is dismissed.

This is the Decision and Order of the Court.

Dated: June 28, 2017
New York, New York

ARLENE P. BLUTH, JSC