Matter of Golden Horse Realty, Inc. v NYS Div. of Hous. & Community Renewal
2018 NY Slip Op 30636(U)
April 10, 2018
Supreme Court, New York County
Docket Number: 158730/2017
Judge: Arlene P. Bluth
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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
GOLDEN HORSE REALTY, INC.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL, and KEITH LISY, and SHANNON TYREE and JONATHAN BLITT,

Respondent.

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Index No. 158730/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

ARLENE P. BLUTH, JSC

The petition to annul a determination by respondent the New York State Division of Housing and Community Renewal ("DHCR") is denied and this proceeding is dismissed.

Background

Petitioner purchased a building located at 107 MacDougal Street in Manhattan in 2000. Petitioner claims that the prior owner of the premises represented that certain apartments, including the apartment rented by respondent Keith Lisy (Apartment 1), were subject to rent stabilization. After buying the property, petitioner registered the apartments in the premises as rent stabilized. Petitioner contends that it discovered in other litigation that Apartment 1 was improperly registered as a rent stabilized because it is purportedly a commercial unit and cannot be used as for residential purposes. Petitioner also claims that a violation issued by the Department of Buildings ("DOB") confirms that Apartments 3 and 4 are also unlawful.

Petitioner then brought a proceeding to determine the rent stabilization status of the building. The Rent Administrator found that the premises were subject to rent stabilization. Petitioner filed a petitioner for administrative review ("PAR") challenging the portion of the Rent Administrator's decision that found that Apartment 1 was subject to rent stabilization. DHCR denied petitioner's PAR.

Petitioner claims that DHCR's decision should be vacated because DHCR ignored a DOB violation stating that the first story is commercial space. Petitioner acknowledges that this violation was not before DHCR in the PAR but claims that it was irrational for DHCR not to perform a simple inquiry into the status of the building. Petitioner further argues that rent stabilization cannot be created by waiver or estoppel– petitioner emphasizes that since Apartment 1 is not classified for residential use, it does not matter how the apartment was handled by prior owners.

In opposition, DHCR claims that its decision was rational. DHCR argues that petitioner is barred under the doctrine of collateral estoppel from attacking the DHCR's decision. DHCR contends that petitioner brought an Article 78 proceeding seeking to overturn a PAR that ordered petitioner to pay approximately $377,000 to the tenant in Apartment 5 for rent overcharges. DHCR claims that petitioner had a full and fair opportunity to litigate whether the building is subject to rent stabilization. DHCR further argues that alleged DOB violations have no bearing on the rent stabilization status of apartments in the building and that petitioner's interpretation of the building's certificate of occupancy is not sufficient to reverse DHCR's determination.

Respondent Lisy also submits opposition– he claims that the DOB violation does not compel this Court to vacate DHCR's decision. Lisy claims that the DOB violation arose out of a

complaint about an illegal nail salon operating in an apartment. Lisy also observes that this notice of violation was dismissed well in advance of the commencement of this proceeding.[1]

Collateral Estoppel

As an initial matter, the Court finds that the doctrine of collateral estoppel does not apply here. "The doctrine of collateral estoppel, a narrow species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984]).

Here, the decision by Justice Schecter (*see* NYSCEF Doc. No. 20) did not clearly address the issue of whether Apartment 1 was subject to rent stabilization. Instead, it considered an overcharge complaint related to Apartment 5. The arguments raised in that proceeding dealt with petitioner's fraudulent scheme to deregulate Apartment 5 and DHCR's decision to award treble damages. The Court is not satisfied that petitioner had a full and fair opportunity in that matter to litigate the issue raised here– whether Apartment 1 is subject to rent stabilization based on the claim that this apartment can only be used for commercial purposes.

[1]Respondents Blitt and Tyree (the tenants in Apartments 3 and 4) also submit an answer and observe that petitioner's PAR only addressed Apartment 1 and that the instant petition cannot seek relief against them because it is beyond what was sought in the PAR.

DHCR's Determination

"In reviewing an administrative agency determination, we must ascertain whether there is a rational basis for the action in question or whether it is arbitrary or capricious" (*Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149, 753 NYS2d 1 [2002]).

Here, the Court must analyze the determination issued by DHCR on August 3, 2017 (NYSCEF Doc. No. 3). "The owner's PAR objects only to that portion of the [Rent Administrator's] ruling that Apartment 1 at 107 MacDougal Street (occupied by tenant Keith Lisey [sic]) is subject to stabilization" (*id.* at 1).

DHCR noted that an investigation of the building done in 1987 "revealed that 107 MacDougal Street and 15 Minetta Street constitute an integrated multiple dwelling consisting of nine units in total– i.e. one store and six residential apartments at MacDougal and three residential apartments at Minetta. This finding is not disputed on appeal" (*id.* at 3).

DHCR also found that "a review of the C of O for 107 MacDougal Street, dated December 13, 1957, reveals the use of the 'Basement' story as 'Restaurant', and that the use of the '1st Story' as 'Studios', ten in number. A review of the DOB No Objection Letter of December 16, 2015 is consistent with the C of O in that such letter approves of the eating and drinking establishment at the basement level of 107 MacDougal Street . . . The Commissioner finds that the No Objection letter does not declare the 1st story of MacDougal Street to be of commercial use per se, and that the record is devoid of any proof that a violation has been issued based on Apartment 1 being in violation of the C of O" (*id.*). DHCR also concluded that rent regulation applies regardless of the illegality of the residential occupancy of a unit (*id.*).

The Court finds that the above determination was rational and denies the petition. Even if Apartment 1 were unfit for residential use, that would not preclude a finding that the apartment is subject to rent stabilization (*see e.g., Gracecor Realty Co., Inc. v Hargrove,* 90 NY2d 350, 355, 660 NYS2d 704 [1997] [noting that a 'housing accommodation' under the Rent Stabilization Law "is not limited by any physical or structural requirement, such as minimum square footage"]; *White Knight Ltd. v Shea,* 10 AD3d 567, 782 NYS2d 76 [1st Dept 2004] [finding that eight units were subject to rent stabilization despite the fact that each of the units did not have windows or resemble traditional apartments]). Utilizing a unit as a residential apartment in contravention of the certificate of occupancy does not exempt the unit from rent stabilization (*see Joe Lebnan, LLC v Oliva*, 39 Misc3d 31, 965 NYS2d 268 [App Term, 2d Dept 2d, 11th & 13th Jud Dists 2013] [finding that eight residential units in the building were rent stabilized despite the fact that the certificate of occupancy listed five residential units and a dentist's office and the spaces were unlawfully converted from commercial to residential]). There is no basis to support petitioner's claim that violating the certificate of occupancy forecloses any consideration of rent stabilization.

Simply put, petitioner failed to articulate how actions taken by DOB compel a different determination from DHCR. The question of whether a space is subject to rent stabilization is different from whether a space is zoned for residential use. Under the Rent Stabilization Code, a housing accommodation is "that part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home dwelling unit or apartment" (Rent Stabilization Code § 2520.6). Petitioner did not point to any language in the Rent Stabilization

Code or any case law that holds that a space used as a housing accommodation can never be classified as rent stabilized by DHCR if it is zoned as commercial.

Here, there is no question that Apartment 1 is occupied by an individual (respondent Lisy) as a residence. Contrary to petitioner's claims, DHCR did not find rent stabilization by estoppel or waiver; instead, DHCR relies on the petitioner's leases (and annual registrations) of Apartment 1 to show that the space is used as a housing accommodation.

And the actions by DOB do not demonstrate that DHCR's determination was arbitrary or capricious. DOB's No Objection letter (*see* NYSCEF Doc. No. 6) did not compel the conclusion that Apartment 1 was exempt from rent stabilization. Critically, that letter stated that the first floor "*can* be used as Studios (Non-Residential)" (*id.* [emphasis added]). It did not affirmatively state that no residential apartments are permitted on the first floor of 107 MacDougal Street.

The Court also observes that the DOB notice of violation does not compel a different outcome either because that violation was dismissed (*see* NYSCEF Doc. No. 34). Obviously, because it was dismissed, there is no affirmative finding that Apartment 1 is illegal. A notice of violation that resulted in *no action* taken by DOB is not enough to support petitioner's claim that DHCR's determination was irrational. The Court also observes that it is not clear that the DOB violation even related to Apartment 1 and that this issue was not raised before DHCR during the PAR.

Summary

In this proceeding, petitioner simply failed to meet its burden. It failed to cite relevant case law to support its claim that an illegal apartment cannot be classified as rent stabilized. In

fact, "Apartments do not need to be legal in order to subject the building to rent stabilization" (*20 MK LLC v Carchi,* 58 Misc2d 1208(A0, 2017 NY Slip Op 51944(U) [Civ Ct, Queens County 2017]). And the documents petitioner points to, the No Objection Letter and the Notice of Violation from DOB, do not establish that the apartment is illegal.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: April 10, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH