

**Independence House Tenants' Assn. v New York
City Hous. Preserv. & Dev.**

2018 NY Slip Op 30698(U)

April 13, 2018

Supreme Court, New York County

Docket Number: 154058/17

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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INDEPENDENCE HOUSE TENANTS' ASSOCIATION
LOUIS T. RICCIARDI, CATHERINE WILLIAMS,
ROGER ROTHSTEIN, BARRY BOVSHOW,
SOMPONG SAKPETCH AND FRANK J. IBARRIA,

DECISION and ORDER

Petitioners,

INDEX NO.: 154058/17

-against-

Present:
Hon. Lynn R. Kotler, J.S.C.

NEW YORK CITY HOUSING PRESERVATION
AND DEVELOPMENT, INDEPENDENCE OWNERS,
LLC, WEST SIDE FEDERATION FOR SENIOR
AND SUPPORTIVE HOUSING and HP
INDEPENDENCE HOUSE DEVELOPMENT FUND
COMPANY, INC.

Respondents.

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This is an Article 78 proceeding. In an amended notice of petition, petitioners seek an order annulling the issuance of a rent increase order in connection with a Mitchell-Lama housing development located at 176 West 94th Street, New York, New York (the "building"). Petitioners further seek an order compelling respondent New York City Housing Preservation and Development ("HPD") to comply with their FOIL request. Ultimately, petitioners request that the court remand this matter to HPD to conduct a hearing in accordance with relevant law and due process.

Petitioners are Independence House Tenants' Association, a tenants' association representing the tenants who reside in the building, and several tenants in the building, to wit, Louis T. Ricciardi, Catherine Williams, Roger Rothstein, Barry Bovshow, Sompong Sakpetch and Frank J. Ibarria. Petitioners allege that they all face an imminent loss of their apartments if the rent increase order is not annulled.

Respondents are HPD, Independence Owners, LLC ("Independence Owners"), Westside Federation for Senior and Supportive Housing ("WFSSH") and HP Independence

House Development Fund Company, Inc. ("HP Fund Co."). HPD is the administrative agency responsible for, *inter alia*, review, assessment and determination of rent increases in Mitchell-Lama housing in New York City pursuant to Article II of the Private Housing Finance Law. Independence Owners purchased the building in December 2013 and sold it recently or is currently negotiating its sale to WFSSH. HP Fund Co. manages and/or managed the building. Respondents have each answered the petition. The court's decision follows.

According to the amended verified petition, HPD issued a "Commissioner's Order" dated August 7, 2017 which authorized a 221% per room per month increase effective September 1, 2017, and 2.5% per room per month rent increases each for the two years following thereafter (the "rent increase order"). Petitioners allege that the building, which contains 119 residential units as well as commercial space, rents out the commercial space out below market rates. Further, petitioners allege that there are approximately thirty vacant units in the building. Petitioners claim that as a result, they've been burdened with the shortfall and vacancies.

Meanwhile, the challenged rent increase order was issued pursuant to an application which called for an increase of the maximum average monthly rent per room per month from \$192.03 to an indeterminate rate to be set by HPD. Meanwhile, there was a prior application in 2014 by Independence Owners which requested an 18% increase in year 1, 15% in year 2 and 7% in year 3. A hearing on that prior application was held on March 4, 2015. Petitioners further allege that they have been unlawfully assessed utility charges in prior rent increase while also separately paying utilities in addition to the rent.

Petitioners argue that HPD did not determine the reasonableness or appropriateness of the Owners' 2014 rent increase application. In their answers, respondents claim that the 2014 rent increase application was abandoned.

On March 22, 2017, a meeting was held at the building where it was announced that Independence Owners was going to sell the building to WSFSSH. According to petitioners,

Manhattan Borough President Gale Brewer and Councilperson Helen Rosenthal suggested that any proposed rent increase be subsidized by Section 8 Federal Housing and other subsidies.

Petitioners claim that they seek disclosure to determine the appropriateness of the rent increases, specifically information regarding the fair market value of the building and the terms of the sale. Petitioners argue that without this information, they have been denied the right to meaningfully participate in the rent increase PHFL Article II proceeding. Petitioners further contend that HPD has failed to offer a rational or reasonable explanation pertaining to the challenged rent increase order.

Petitioners assert two causes of action: annul the challenged rent determination and remand back to the HPD; and that HPD's processing of a rent increase application while the 2014 rent increase application was pending is arbitrary, capricious and an unlawful abuse of discretion.

In its answer, HPD offers a counterstatement of facts. HPD argues that petitioner's attorney failed to exhaust administrative remedies with regards to the FOIL request, and therefore, the court lacks jurisdiction over this claim. HPD otherwise maintains that rent increase order was rational, reasonable and supported by the administrative record. Therefore, HPD contends that the court deny the petition.

WSFSSH has submitted an answer generally denying petitioner's claims. WSSFSSH has also submitted the affidavit of Paul Freitag, its Executive Director, who states the following. WSSFSSH is a non-profit housing organization which sought to purchase the building in order to keep it affordable. Freitag maintains that while the legal rent will be raised to the maximum allowable to receive Section 8 subsidies, the tenants will not pay those rents. For those tenants who are not eligible for Section 8, WSSFSSH will offer "rent protections to all tenants pursuant to a Landlord Assistant Plan ("LAP")." The LAP provides that "no tenant will ever pay more than 30% of income to rent" and takes the form of a lease rider. As a result, Freitag represents that

no tenant will pay the lesser of: [a] a 2.5% annual increase to his or her current rent; or [2] 30% of household income to rent.

In reply, petitioners concede that HPD has instituted a program whereby tenants are required to apply for Section 8 subsidies, and if they are not eligible for that, they will be offered the LAP lease rider. Further, petitioners state that “non cooperating tenants defined as those tenants who fail to fill out appropriate Section 8 applications or who fail to sign a LAP agreement will be subject to a 15% annual rent increase for two consecutive years, followed by 5% permanent increases yearly thereafter.” Further, non cooperating tenants will be subject to additional Mitchell Lama surcharges and fees. Petitioners contend that this “penalty provision has not been subject to any review, analysis or determination during the HPD rent review process.”

Discussion

At the outset, that portion of the petition concerning the FOIL request must be denied since petitioners have not exhausted their administrative remedies. Pursuant to POL § 89(3) and (4), a two-step administrative process must be exhausted at the agency from which the records have been sought - an initial administrative FOIL determination, and an administrative FOIL appeal determination. As HPD correctly points out, the court can only review an agency's FOIL appeal determination, which is the final agency determination (*Covington v. Sultana*, 59 AD3d 163 [1st Dept 2009]). Indeed, petitioners have failed to address HPD's arguments on this point in their reply. Accordingly, that portion of the petition which seeks an order compelling HPD to comply with their FOIL request is denied.

The court now turns to the balance of the petition. Pursuant to CPLR § 7803 (4), a party may commence a proceeding to contest “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.”

CPLR § 7804 (g) provides that “[w]here the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding.” However, “[w]here such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue.” *Id.* “If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced.” *Id.*

Here, as set forth above, the amended petition expressly contends that the rent increase order was not supported by substantial evidence demonstrating a foundation for the rent increase. As such, this proceeding must be transferred to the Appellate Division, First Department, pursuant to CPLR § 7804 (g).

The court notes that petitioner has also argued that the HPD’s rent increase order was irrational, arbitrary and capricious. However, the issue of whether an underlying determination was irrational, arbitrary and capricious is not an objection that could terminate a proceeding within the meaning of CPLR 7804 (g) (*Matter of OTR Media Group, Inc. v Board of Stds. & Appeals of the City of NY*, 132 AD3d 607, 607 [1st Dept 2015]). Thus, in cases where the petitioner raises both the substantial evidence issue and the arbitrary and capricious issue, both are reviewable by the Appellate Division *de novo*. (*Id.*; see also *G&G Shops, Inc. v. New York City Loft Bd.*, 193 AD2d 405 [1993]).

CONCLUSION

In accordance herewith, it is hereby

ORDERED that that portion of the petition which seeks an order compelling HPD to comply with their FOIL request is denied; and it is further

ORDERED that the balance of this proceeding must be transferred to the Appellate Division, First Department, pursuant to CPLR § 7804 (g).

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

This constitutes the Decision and Order of the court.

New York, New York

4/13/18

So Ordered:



Hon. Lynn R. Kotler, J.S.C.