

<b>Matter of Clinton Rising, LLC v New York City Env'tl. Control Bd.</b>
2018 NY Slip Op 31087(U)
May 11, 2018
Supreme Court, Kings County
Docket Number: 506983/17
Judge: Carl J. Landicino
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At an IAS Term, Part 81, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11<sup>th</sup> day of May, 2018.

PRESENT:

HON. CARL J. LANDICINO,  
Justice

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In the Matter of the Application of

CLINTON RISING, LLC,  
Petitioner,

- against -

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,  
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,  
and THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules of New York.

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The following e-filed papers read herein:

**DECISION AND ORDER**

Index No. 506983/17

Mot. Seq. No. 1-2

NYSCEF No.:

Notice of Petition, Petition, and Affidavit (Affirmation) and Exhibits Annexed _____	<u>1-5; 6-20</u>
Answer with Exhibits Annexed _____	<u>24-38</u>
Respondents' Memorandum of Law _____	<u>39</u>
Petitioner's Reply Affirmation _____	<u>40</u>

Upon the foregoing papers in this CPLR article 78 proceeding, petitioner Clinton Rising, LLC (petitioner) moves for a judgment:

- 1) Overturning and reversing as arbitrary, capricious, and legally erroneous the administrative Appeal Decision and Order, dated December 1, 2016, in *City of New York v Clinton Rising LLC*, Appeal No. 1601026, Office of Administrative Trials

and Hearings (OATH), which affirmed i) the Decision and Order, dated June 1, 2016, which sustained Notice of Violation 035169186Z (NOV 86Z) and imposed a fine of \$3,000, and ii) the Decision and Order, dated June 1, 2016, which sustained Notice of Violation 035169234Y (NOV 34Y) and imposed a fine of \$800, with respect to petitioner's real property located at 436-440 Waverly Avenue in Brooklyn, New York (the property);

2) Declaring and vacating NOV 86Z and NOV 34Y (collectively, the NOVs) and reimbursing petitioner \$3,800 it allegedly paid on account thereof;

3) Declaring that petitioner's "occasional" rentals of its property for shorter than 30 consecutive days are legal; *provided* that petitioner's rentals of its property remain "as a rule" for at least 30 consecutive days; and

4) Awarding petitioner damages to compensate it for its legal fees and costs related to the NOVs.

### ***Background***

Petitioner owns the property which is a two-unit residential building. Julian Richards and Ronald Eckhardt are the primary tenants of one of the two apartments in the building (the apartment). NOV 86Z alleges that petitioner violated the certificate of occupancy for the property by allowing the primary tenants to rent the apartment for periods shorter than 30 consecutive days at a time (*see* Building Code § 118.3.2 ["No change shall be made to a building . . . or portion thereof inconsistent with the last issued certificate of occupancy."]).

NOV 34Y alleges that petitioner, by failing to file an accurate certificate of correction with respect to NOV 86Z, violated Building Code § 204.4, which provides, in relevant part, that “[f]ailure to comply with [a NOV] to correct and to certify correction of a violation within the applicable time period shall be a violation of [the Building Code] for which [additional] penalties may be imposed.”

A consolidated administrative hearing on the NOVs was held at the New York City Environmental Control Board (ECB) on May 23, 2016. An inspector from the New York City Department of Buildings (DOB) testified that when he visited the apartment at issue it was occupied by Roxanne Jibley, a visitor from Australia. According to the DOB inspector, Ms. Jibley stated to him that she booked the rental for the apartment through a specific Web site from one of the primary tenants (Mr. Richards) for a period that was shorter than 30 consecutive days. In addition, the inspector indicated that Ms. Jibley showed him a laptop with an email confirmation. As Mr. Richards was not available for the hearing, the other primary tenant (Mr. Eckhardt) testified on behalf of both of them and as the sole witness for petitioner. Mr. Eckhardt stated that neither he nor Mr. Richards occupied the apartment at the time of Ms. Jibley’s residence therein, as both of them were busy with their respective personal matters. Although Mr. Eckhardt argued that he and Mr. Richards had a 30-day sublease with Ms. Jibley and offered same in evidence, he was unable to explain whether and, if so, how much he and Mr. Richards received from Ms. Jibley for the entire duration of the purported 30-day sublease. Mr. Eckhardt’s testimony was reproduced in the transcript of the OATH hearing.

By two separate decisions, each dated June 1, 2016, ECB sustained each NOV. ECB credited the DOB inspector's testimony and discounted the primary tenants' sublease to Ms. Jibley, finding that it was not what the Petitioner contended it was. On December 1, 2016, OATH affirmed the decisions below in a reasoned appeal decision and order. This proceeding was commenced thereafter.

### *Standard of Review*

An agency determination, even if made after a hearing, may be challenged in Supreme Court under CPLR 7803 (3) if the decision was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." It is well established that "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). "Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference" (*Testwell, Inc. v New York City Dept of Bldgs.*, 80 AD3d 266, 276 [2d Dept 2010]).

### *Discussion*

Building Code § 310.1.3 sets forth the parameters for the occupancy rating (here R-3<sup>1</sup>) of the property at issue. As relevant herein, the R-3 occupancy rating “include[s] buildings or portions thereof containing no more than 2 dwelling units, occupied, *as a rule*, for shelter and sleeping accommodation on a long-term basis for a month or more at a time” (Building Code § 310.1.3 [emphasis added]). The First Department in *City of New York v 330 Cont. LLC*, 60 AD3d 226 (2009), construed the identical phrase “as a rule” as used in the then-effective, but later-repealed, provision of the Multiple Dwelling Law.<sup>2</sup> The First Department in *330 Cont. LLC* held that the phrase “as a rule” means that “no violation . . . of the certificate of occupancy would result from the use of a *minority* of the [dwelling] units in one of the buildings for nonpermanent or transient occupancy” (at 231 [emphasis added]). The term “dwelling unit,” as used in Building Code § 310.1.3, means “[a] single unit consisting of one or more habitable rooms and occupied or arranged to be occupied as a unit separate from all other units within a dwelling” (Building Code § 310.2).<sup>3</sup>

The crux of this case is that petitioner was *not* using a “minority” of the property’s dwelling units for short-term rentals. Rather, petitioner’s primary tenants made available for

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<sup>1</sup> It is undisputed that the property’s J-3 rating under its certificate of occupancy issued under the then-extant version of the Building Code is equivalent to the R-3 rating under the current version of the Building Code (*see* Building Code § 101.3.1).

<sup>2</sup> It is undisputed that the Multiple Dwelling Law does not apply to the property at issue.

<sup>3</sup> The term “dwelling” is, in turn, defined as “[a] building or structure which is occupied in whole or in part as the home, residence or sleeping place of one or more families” (Building Code § 310.2).

online booking short-term rentals for one of the two units (or one-half) of the entire property. The record indicates, without contradiction, that the DOB inspector who had issued the NOV was able, after his visit to the apartment, to find it available online for future short-term rentals. The record further indicates, likewise without contradiction, that, both at the time of the inspection and at the time of the ECB hearing, petitioner's primary tenants did not reside in the apartment. Respondents acted within their discretion in rejecting the primary tenants' purported 30-day lease with Ms. Jibley. Far from being arbitrary and capricious, respondents' determinations in sustaining the NOVs were neither affected by an error of law nor an abuse of discretion.

**Conclusion**

Accordingly, it is

**ORDERED** that the petition in Seq. No. 1 is denied as having been superseded by petition in Seq. No. 2; and it is further

**ORDERED** that the petition in Seq. No. 2 is denied in its entirety, and the proceeding is dismissed.

This constitutes the decision, order, and judgment of the Court.

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J. S. C.

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 FILED  
 KINGS COUNTY CLERK

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NANCY T. SUNSHINE  
 Clerk