

**Columbus Sq. 795 LLC v New York City Off. of  
Admin. Trials & Hearings**

2018 NY Slip Op 32666(U)

October 16, 2018

Supreme Court, New York County

Docket Number: 150903/2018

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Masley Justice

PART 48

Columbus Square 795 LLC

INDEX NO. 150903/2018

New York City Office of Administrative Trials and Hearings and New York City Department of Buildings

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**Motion is decided in accordance with accompanying memorandum decision in motion sequence.....**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 16, 2018

  
HON. ANDREA MASLEY, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
Columbus Square 795 LLC

Index No. 150903/2018  
Mot. Seq. No. 001

Petitioner,

-v.-

New York City Office of Administrative Trials and  
Hearings and New York City Department of Buildings,  
Respondents.

-----X

**Masley, J.:**

Upon the foregoing papers, it is ordered that the petition is denied, the cross-motion is granted, and the proceeding is dismissed.

Petitioner, Columbus Square 795 LLC, moves by notice of petition, dated January 30, 2018, for a judgment pursuant to Article 78 of the CPLR (i) annulling the November 2, 2017 Appeal Decision and Order of the New York City Office of Administrative Trials and Hearings ("OATH"), which reversed the July 31, 2017 Decision and Order of an OATH Administrative Law Judge dismissing Notices of Violations #035220388H and #035220389J ("NOVs") and (ii) dismissing the NOVs. Respondents, OATH and the New York City Department of Buildings ("DOB"), cross move to either transfer the Article 78 to the Appellate Division for review of substantial evidence or alternatively, deny the petition. Petitioner's motion is denied and Respondent's cross-motion is granted.

Petitioner is the owner and landlord of the building located at 795 Columbus Ave, New York, NY (the "Building"). On February 4, 2017, Petitioner was issued the NOVs that stated that Apartments 6B and 11G (the "Apartments") were being utilized for illegal occupancy in violation of NYC Administrative Code §§28-210.3 and 28-202.1, as well as NYC Building Code §907.2.8. Petitioner, without admitting illegal occupancy, contends that any alleged transient occupancy at the Apartments ceased immediately upon the landlord's receipt of the NOVs. As a safeguard, the landlord claims that it took action to terminate the tenancies in the Apartments, with one voluntarily vacating and the other ultimately being evicted.

A hearing was conducted on July 20, 2017 before an ALJ of the OATH. At the hearing, Issuing Inspector Filatov testified that he went to the Apartments and spoke with the individuals inside, who informed him that they had rented the Apartments on a short-term basis, for a period of time less than 30 days. The inspector offered evidence at the hearing of photographs of an email on a cell phone, allegedly belonging to the individual from China staying in one of the Apartments, as well as a printout of what the inspector viewed on the phone. The contents of the printout included the dates, "check-in/check-out" policies and other general information related to the alleged rental. The

landlord argued that there was no evidence that any money was exchanged for the alleged occupancy, no address was stated on the email or printout, and the apartment on the reservation was #116B, which does not exist in the Building.

Pursuant to a decision and order issued on July 31, 2017, the ALJ dismissed the NOV's on the ground that the DOB failed to establish that at the time the NOV's were issued there was illegal transient occupancy in the Apartments. OATH, on appeal, reversed the dismissal, reinstated the NOV's, and imposed a fine of \$49,800 against Petitioner.

Petitioner argues that DOB failed to sufficiently establish a claim of illegal transient use of the Apartments under NYS Multiple Dwelling Law § 4(8)(1) and NYC Administrative Code § 27-2004(a)(8)(1) since there is no proof in the alleged reservation confirmation email that any monetary compensation was paid for the alleged short-term rental. Petitioner contends that OATH's acceptance of the inspector's photograph allegedly depicting a confirmation email on the occupant's cell phone with no date and time, no address, and an incorrect apartment number - in conjunction with the inspector's testimony that the individuals he spoke with were short-term occupants - is nothing short of arbitrary and capricious. In addition, Petitioner argues that the fines totaling \$45,000 is inflated, as under 1 RCNY §102-01 (g) fines only accrue up to the date of correction, and the landlord claims to have ceased any alleged illegal occupancy immediately.

Respondents cross moves to dismiss the petition pursuant to CPLR 7804 (g) authorizing the court to decide any issues which would terminate the case. Respondents argue that the proceeding should be dismissed and penalties imposed because the OATH decision was not arbitrary and capricious and the Petitioner failed to offer proof that illegal transient occupancy ceased in its building.

First, there is no issue of substantial evidence in this case which would require a transfer for disposition to a term of the appellate division. This court finds that under a rational basis review the regulating agency acted in a lawful and reasonable manner. Petitioner has failed to establish that the action was without reasonable foundation. (*see Kayfield Construction Corp. v Morris*, 15 AD2d 373, 379 [1st Dept 1962].) Here, the inspector had a face-to-face conversation with temporary occupants of the apartment who admitted that they had booked their stay through a website and showed him evidence of such. According to the testimony of Inspector Filatov, the occupants informed him that they: (a) booked through a website for a couple of days' time; (b) were staying by themselves; (c) had never seen the host; and (d) didn't know the tenants. The fact that the confirmation email the inspector viewed, which displayed booking information, did not show a proper address nor a monetary rental amount, and included a potentially bogus apartment number - yet suspiciously similar to the actual ones - is incidental. A reasonable mind could conclude the same. (*see 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978].)

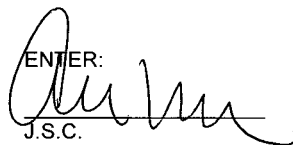
Specifically, in regards to the issue of monetary exchange, Petitioner would have this court rely on NYS Multiple Dwelling Law § 4(8)(1) which states that "incidental and occasional occupancy . . . for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent" is lawful "provided there is no monetary compensation paid to the permanent occupants for such occupancy." However, Respondents argue that Administrative Code § 28-210.3 does not require proof of payment to establish the conversion of a class A dwelling to transient occupancy. This court agrees with Respondents' claim that it is "rational and reasonable for OATH to conclude that a tourist who has booked an apartment 'for a couple of days' through a booking website paid money in exchange." Further, the email shown to Inspector Filatov states that if temporary occupants pick up keys outside normal office hours "an additional fee" may be charged and that if occupants do not meet the check-out deadline, they "may be charged for up to twice the daily rate." These statements clearly refer to "additional" charges that may be incurred by occupant. Thus the Decision has a rational basis.

Next, the Petitioner would have this court dismiss or reduce the fines based on the testimony of property employees who stated that occupancy ceased immediately. However, there is no documentary evidence to verify these statements, nor any companion documentation proving the existence of eviction proceedings. (see *Pamela Equities Corp. v Environmental Control Board of N.Y.* 2017 N.Y., 72 NYS3d 764 [Sup Ct, NY County 2017].) The only proof Petitioner offers are unanswered knocks on the door by property employees, nominal efforts which do little to justify their hefty request. Pursuant to 1 RCNY §102-01 (g), Respondents' daily penalties of \$1,000 for the forty-five-day period is permissible.

Accordingly, it is

ORDERED that NYC OATH and NYC DOB's cross-motion is granted, and the petition is denied.

Dated: 10/16/18

ENTER:  
  
J.S.C.

HON. ANDREA MASLEY