Matter of JNPJ Tenth Ave, LLC v Department of Bldgs. of the City of New York
2018 NY Slip Op 33479(U)
January 18, 2018
Supreme Court, New York County
Docket Number: 100268/2018
Judge: Carmen Victoria St. George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

EA 1/18/19 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Carmen Victoria St. George PART 34
Justice

Index Number : 100268/2018
JNPJ TENTH AVE, LLC
vs
DEPT OF BUILDINGS OF THE
Sequence Number : 001
ARTICLE 78

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1-3, Exh A-W
Answering Affidavits — Exhibits	No(s). 4, Exh A-K, 5
Replying Affidavits	No(s). 6

7 = OATH Transcript

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

petition dismissed ~~MOTION IS DECIDED~~ IN ACCORDANCE WITH THE ATTACHED DECISION, and the clerk is directed to enter judgment accordingly.

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

RECEIVED
JAN 18 2019
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED
JAN 22 2019
NEW YORK COUNTY CLERK

Dated: 1/18/2019 ______, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
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
NEW YORK COUNTY: IAS PART 34

---X

In the Matter of the Application of
JNPJ Tenth Ave, LLC,

Petitioner,

Index No. 100268/2018

For a Judgment pursuant to Article 78
Of the CPLR in the Nature of Certiorari,

Motion Sequence 001

-against-

Decision, Order and Judgment

The Department of Buildings of the City of New York,

The Environmental Control Board of the City of New York, and

Office of Administrative Trials and Hearings,

FILED
JAN 22 2019
NEW YORK COUNTY
COUNTY CLERK

Respondents.

---X

Carmen Victoria St. George, J.S.C.:

Petitioner is the owner of an apartment rental building located at 814 Tenth Avenue in Manhattan (the building). In this capacity, petitioner leased apartment 1A to Martine LaCroix (the tenant) from August 1, 2016 to July 31, 2017. This was a renewal lease, which indicates that the tenant rented the apartment for at least one year prior to August 1, 2016. A rider to the least states that the "Tenant(s) understand(s) that it is illegal for a tenant to rent out this unit for temporary stays, less than 30 days, on Air BNB or other websites." This rider essentially requires compliance with New York City Administrative Code (NYC Administrative Code) § 28-210.3, which provides:

> Except as otherwise provided . . . , dwelling units within (i) a class A multiple dwelling as defined in section 27-2004 of the

> administrative code, (ii) occupancy group J-2 as described in section 27-265 of the administrative code or (iii) occupancy group R-2 as described in section 310.1.2 of the New York city building code shall be used only for permanent residence purposes . . . . It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes. For the purposes of this section a conversion in use of a dwelling unit may occur irrespective of whether any physical changes have been made to such dwelling unit. . . .

In addition, several ancillary building code requirements exist when the building contains transient rental units. These specify the owner's obligations with respect to automatic sprinkler units, alarm systems, and ingress and egress access (*see* New York City Administrative Code [NYC Administrative Code] § 28-301.1; NYC Administrative Code §907.2.8).

New York City Administrative Code § 28-301.1, also relevant here, states:

> All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition.

Around April 13, 2017, petitioner received a notice of violation, which alleged that apartment 1A had been converted to transient use in violation of NYC Administrative Code § 28-210.3. Respondents also issued notices of violation relating to the three ancillary code requirements, under NYC Administrative Code § 28-301.1 and Building Code § 907.2.8. Petitioner participated in a July 20, 2017 hearing before the Office of Administrative Trials and Hearings (OATH). Petitioner objected during the hearing and, inter alia, presented evidence supporting its

Supreme Court Records OnLine Library - page 3 of 11

claim that it was ignorant of the prohibited use. The hearing officer found that there was transient use in apartment 1A and sustained all violations.[1] Petitioner was assessed a $4,600 penalty, which had been mitigated, at respondents' suggestion, due to petitioner's prompt and successful efforts to remedy the problems. The hearing officer rejected petitioner's argument that NYC Administrative Code § 28-210.3 required intent, noting that prior OATH determinations had concluded that this was not an element.

Petitioner paid the penalty but also challenged the OATH officer's determination. OATH's Appeals Unit denied the appeal in a January 4, 2018 decision and order. The order noted that petitioner did not challenge the factual findings but argued that because it was unaware of the prohibited use it did not "permit" it within the meaning of NYC Administrative Code § 28-210.3 (*see* OATH Appeal No. 1701140, Jan 12, 2018). The Appeals Unit adopted the same reasoning as the hearing officer in rejecting this argument.

Subsequently, petitioner commenced this proceeding to challenge both rulings. Petitioner alleges that it was unaware that the tenant was renting out her apartment through Airbnb or a similar service and therefore is not culpable for its tenant's violations. Although petitioner seeks a ruling that the OATH orders were contrary to the facts and evidence it presented at the hearing and on appeal, this is based upon its position that the facts and evidence showed that petitioner lacked knowledge of the tenant's use of the apartment as a transient rental unit. Thus, the petition essentially raises a legal challenge: can the owner of a building be held liable for its tenant's violation of NYC Administrative Code § 28-210.3 when the landlord is unaware of the violation?

In support of its application, petitioner states that this is a matter of statutory interpretation. It cites *Kurcsics v Merchants Mutual Ins. Co.*, 49 NY2d 451, 459 [1980]), which distinguishes

[1] The tenant, Marie LaCroix, has since been evicted from the apartment following a nonpayment proceeding which petitioner initiated against her in Housing Court in February 2017.

Supreme Court Records OnLine Library - page 4 of 11

between statutes where the agency's interpretation is based on its institutional knowledge and statutes for which the interpretation requires "pure statutory reading and analysis" and finds that only in the former instance should courts defer to the agency's interpretation. As such, courts must reject determinations by the agency that run counter to the clear wording of a statutory provision" (*International Union of Painters & Allied Trades v New York State Dept. of Labor*, 32 NY3d 198, 215 [2018] [quoting *Kurcsics*, 49 NY2d at 459]). Petitioner states that because the phrase "permits" clearly requires knowledge by the landlord of the prohibited use, a landlord cannot be held responsible unless it knowingly allows the transient rentals to continue. Therefore, it argues, respondents have misinterpreted the challenged provision (*see, e.g., Prometheus Realty Corp. v New York City Water Board*, 30 NY3d 639, 653 [2017]).

In addition, petitioner points out that Martine LaCroix, the tenant in apartment 1A, "is an internet operator who leases multiple apartments for sublease to the transient occupancy market," and states that she is well known in landlord-tenant court (Brusco Aff in Support of Petition, ¶ 31).[2] Given this habitual conduct, petitioner argues, respondents should focus on Ms. LaCroix rather than on the landlords she has deceived. Petitioner points out that its counsel represents many multiple dwelling owners and has both challenged the practice of holding landlords accountable for their tenants' malfeasance and stated that counsel and his clients, who also oppose such transient use, would assist the Mayor's Office of Special Enforcement in identifying and prosecuting the tenants who violate NYC Administrative Code § 28-210.3. Counsel states these gestures have been of no avail.

In opposition, respondents first state that challenges to an OATH determination must be reviewed by the Appellate Division. The Court rejects this argument without further discussion,

[2] Petitioner claims Ms. LaCroix has been the subject of dozens of eviction proceedings throughout the City.

Supreme Court Records OnLine Library - page 5 of 11

as petitioner does not challenge the factual findings of the hearing officer but the way the agency has interpreted the law (*see Jennings v Commissioner, New York State Dept. of Social Serv.*, 71 AD3d 98, 108-09 [2nd Dept 2010]; *Columbus Square 795 LLC v New York City Office of Administrative Trials and Hearings*, 2018 WL 5258761, *2, 2018 NY Slip Op 32666 [U], **3 [Sup Ct NY County 2018]). Moreover, the Court does not consider respondents' arguments to the extent they relate to whether substantial evidence supports OATH's factual determinations.

Thus, the Court turns to respondents' additional arguments. Respondents note that courts treat agency determinations with deference, and only overturns an agency's interpretation of the applicable law when it is unreasonable (*citing Matter of Howard v Wyman*, 28 NY2d 434, 438, *reargument denied*, 29 NY 749 [1971]; *see also Natural Resources Defense Council, Inc. v New York State Dept. of Environmental Conservation*, 25 NY3d 373, 397 [2015]). It stresses that "[w]hile as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term" (*O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]). If the record supports the determination and there is a reasonable basis in law for the decision as well, courts should sustain the agency's interpretation of the governing law and its ruling (*citing Lower Manhattan Loft Tenants v New York City Loft Board*, 104 AD2d 223, 224 [1st Dept 1984]).

Here, respondents argue, the OATH decisions that petitioner's knowledge of the prohibited use of the apartment is rational. They cite the decision in *Pamela Equities v Environmental Control Board of the City of New York*, 59 Misc 3d 1007 [Sup Ct NY County 2017]), which found that the owner's liability in these circumstances exists regardless of the owner's knowledge of the prohibited use. They also argue that their interpretation of the law is consistent with its legislative

Supreme Court Records OnLine Library - page 6 of 11

purpose of averting a worsening of the permanent housing crisis (*citing Matter of Albany Law School v New York State Office of Mental Retardation and Developmental Disabilities*, 19 NY3d 106, 120 [2012]; *see also People v Silburn*, 31 NY3d 144, 155-57 [2018] [citing and applying the principle set forth in *Albany Law School*]). Respondents point to NYC Administrative Code 28-301.1 in support of their position, as it requires an owner to maintain its building in a code compliant manner and the transient use of permanent housing violates the code. It notes that cases such as *Guzman v Haven Plaza Housing Dev. Fund Co.* (69 NY2d 559, 566 [1987] [finding that owner is chargeable with constructive notice of violations in those apartments it has the authority to enter]) and *Weiss v City of New York* (16 AD3d 680, 681 [2nd Dept 2005]) stress that this duty is not delegable. They also compare the code provision at hand to Building Code § 28-502.6.1, which holds landlords responsible when they "directly or indirectly" allows signs that violate the code to be erected, and note that the First Department found that this language is clear on its face (citing *Matter of JT Tai & Co., Inc. v City of New York*, 85 AD3d 433, 434-35 [1st Dept 2011] [JT Tai] [courts must "constru[e] . . . statutory provisions by their plain terms . . . when statutory interpretation does not involve specialized knowledge"], *lv denied*, 18 NY3d 804 [2012]). It states that the plain meaning of the word "permits" is similarly clear on its face and mandates dismissal of this proceeding. Respondents state that their ability to pursue claims against the tenant responsible for the violation does not detract from their power to proceed against the building owner.

In reply, petitioner argues that the code is clear on its face, and that the language supports its position that knowledge is required for liability to be imposed. It asserts that respondents' interpretation of the code provision is "tenuous and must be rejected" (Reply Mem. Of Law, p 4) because a landlord only "permits" a violation when it is aware of the illegal use. It states that the

Supreme Court Records OnLine Library - page 7 of 11

phrase "directly or indirectly," the language in the applicable law there, is distinguishable from the phrase "permits" in that only the former phrase indicates that knowledge is unnecessary. It argues that *Pamela Equities* is distinguishable because the petitioner there only challenged the dollar amount of the penalties and not the assessment itself. It argues that NYC Administrative Code § 28-301.1, which requires a landlord to comply with the code and maintain the building in a safe condition, is inapplicable and does not support the imposition of liability here, because NYC Administrative Code § 28-301.1, a general statute, is superseded by the special statute, NYC Administrative Code § 28-310.3. Petitioner further reiterates its criticism of respondents' practice of reflexively imposing liability on the owners rather than those tenants who violate the law.

The Court has considered the parties' arguments and, upon such consideration it dismisses the petition. The word "permit" is sufficiently broad to include situations in which a landlord, through its failure to monitor the activities in a building it owns and operates, does not know a tenant is using the space illegally. As respondents suggest, in this respect the code is not very different from a provision which holds a landlord liable for indirectly allowing an illegal use. "[C]ourts have long held that a statute which holds a person liable for having permitted or suffered a certain activity may only be enforced against one who know, or should have known, that the activity [was taking] place" (*Northland Transportation, Inc. v Jackson*, 271 AD2d 846, 848 [3rd Dept 2000]). Thus, liability attaches when the party has "knowledge or the opportunity through reasonable diligence to acquire knowledge. This presupposes . . . a fair measure . . . of continuity and permanence" (*Albany Manor Inc. v New York State Liquor Auth.*, 57 AD3d 142, 145 [1st Dept 2008] [substantial evidence question addressed] [citation and internal quotation marks omitted]). In this respect, it is distinguishable from *Albany Manor*, in which the landlord could not be deemed to have permitted the use of marijuana at a tavern on its premises where a single customer was

Supreme Court Records OnLine Library - page 8 of 11

observed to be smoking there on one occasion (*id.*). Here, as petitioner noted at oral argument, Ms LaCroix had rented the apartment for over a year when petitioner received the notices in dispute. It had ample time to discover the illegal use.

Petitioner's argument that respondents should have pursued an action against Martine LaCroix because she is a notorious figure in landlord-tenant courts is unpersuasive. If anything, it hurts petitioner's position that its tenant, such a well-known figure, used the premises illegally. As Ms. LaCroix's business purposes were so established, petitioner could with reasonable diligence discovered her intent to sublet her apartment to transient users.

Furthermore, respondents have shown that the statutory purpose, which is to curb transient use of apartments in residential buildings and preserve the availability of permanent housing, is not harmed by the imposition of liability on the landlord. Indeed, petitioner has pointed out that the scope of liability for those who rent or permit transient use of apartments has grown over the years to better enable respondents to pursue this statutory purpose. As both parties note as well, the ability of respondents to pursue claims against the landlord does not diminish their power to pursue claims against the tenant (*see Pamela Equities*, 59 Misc 3d at 1013). Thus, it simply adds a weapon to respondents' arsenal. Moreover, there is no disincentive to landlords to cooperate with respondents to curb the illegal practice. Instead, the size of the penalty – beyond what is statutorily prescribed – is discretionary, and it may depend upon the landlord's cooperation when it becomes aware that the tenant is renting an apartment to transient sublessees. For example, due to petitioner's prompt efforts in the matter at hand, OATH – at respondents' suggestion – awarded sanctions of only $4600.00, although the law permits penalties of $1,000 a day. In *Pamela Equities*, on the other hand, the landlord was assessed $45,000 in discretionary penalties.[3]

[3] The court reduced this amount by a minimum of $7,000 because the problem was remediated earlier than the OATH officer's findings stated.

Supreme Court Records OnLine Library - page 9 of 11

The Court rejects petitioner's argument that *Pamela Equities* is not relevant because the owner there challenged the amount awarded in discretionary penalties, and here petitioner challenges the imposition of any penalty at all. The court in *Pamela Equities* found that even discretionary penalties may be awarded where the owner does not know about the illegal use and this implicitly acknowledges that the base penalty is also proper. Moreover, in reaching this conclusion, the court raised several salient points which also apply here. For example, the court relied on NYC Administrative Code § 28-301.1 for the proposition that the owner of an apartment is responsible for maintaining the building in a manner consistent with the building code, and states that this requires the owner to pay attention to what goes on in the building, including transient rentals (*id.*) As *Pamela Equities* asserts, the fact that an owner may incur daily penalties even when it lacks knowledge "encourages owners' proactive efforts to know what is occurring in their buildings, to assure compliance with the Administrative Code, and to discover and correct immediately hazardous violations promptly" (*id.*). Under these circumstances and in light of the importance of maximizing permanent housing (and thus alleviating the City's ongoing housing crisis), lax or negligent supervision by the landlord of the apartments in its buildings is properly punishable by fine. Petitioner has more access to information of an improper use in the building it owns than respondents (who seek out illegal uses in the city at large) have, and thus it is practical for respondents to shift a portion of the burden to landlords to discover and cure any illegal uses in their buildings.

This Court also agrees with the decision in *Pamela Equities* that an argument that "respondents' enforcement of Administrative Code §§ 28-301.1 and 28-210.3 does not target the wrongdoer" lacks merit because "their enforcement against the building owner does target one wrongdoer, just not both" (*Pamela Equities*, 59 Misc 3d at 1013). Furthermore, as the court noted,

Supreme Court Records OnLine Library - page 10 of 11

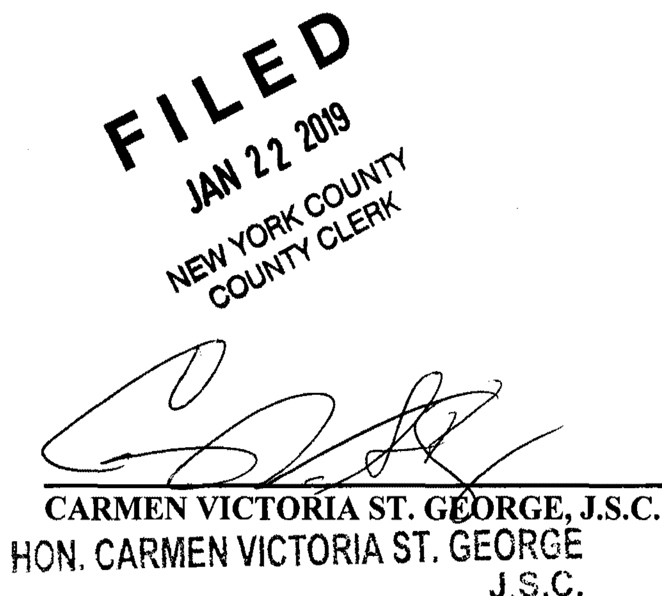
Administrative Code 28-204.6.3 only allows respondents to serve notices of violation against the owner or its agent (*id.* At 1015), and this strengthens respondents' position that it is empowered to target building owners. Petitioner's contention that the rule's purpose should not be considered in light of other regulations is not meritorious. Instead, it is appropriate to consider the rules as a whole rather than in isolation (*see Matter of Rossi v New York City Dept. of Parks and Recreation*, 127 AD3d 463, 465-56 [1st Dept 2015]). Petitioner is not correct that this rule supersedes NYC Administrative Code 28-301.1 because there is no conflict between the two. Finally, the Court rejects petitioner's arguments relating to the fairness of respondents' practice of targeting owners because these issues are better addressed, if at all, by the legislature.

The Court has considered the parties' positions thoroughly, even if it does not address every argument and citation in detail. Accordingly, and for the reasons above, it is

ORDERED that the petition is dismissed.

Dated: January 18th, 2019

ENTER:



CARMEN VICTORIA ST. GEORGE, J.S.C.
HON. CARMEN VICTORIA ST. GEORGE
J.S.C.

Supreme Court Records OnLine Library - page 11 of 11