

**Matter of 99 Sutton LLC v New York City Loft Bd.**

2019 NY Slip Op 33627(U)

December 11, 2019

Supreme Court, New York County

Docket Number: 156043/19

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

99 SUTTON LLC,

Petitioner,

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

Index No.: 156043/19  
DECISION/ORDER

-against-

THE NEW YORK CITY LOFT BOARD,

Respondent.

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**HON. CAROL R. EDMEAD, JSC:**

In this Article 78 proceeding, petitioner 99 Sutton LLC (99 Sutton) seeks a judgment to overturn an order of the respondent New York City Loft Board (the Loft Board) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied.

**FACTS**

99 Sutton is the owner of a building (the building) located at 99-111 Sutton Street in the County of Kings, City and State of New York. *See* petition, ¶ 1. The Loft Board is the New York City agency that oversees buildings governed by Multiple Dwelling Law (MDL) Article 7-C, et seq. (a/k/a the Loft Law). *Id.*, petition, ¶ 2. The building has been registered as an “interim multiple dwelling” (IMD) subject to the Loft Law since 2000. *Id.*, exhibit D.

99 Sutton wishes to end the building’s IMD status and remove it from the Loft Board’s jurisdiction. *See* petition, ¶ 5. To that end, in 2015, 99 Sutton filed a “removal application” with the Loft Board (the removal application), and has since engaged in extensive administrative litigation before the agency. *Id.*, exhibit C.

As will be discussed in more detail below, 99 Sutton originally sought to satisfy the Loft Law's removal application filing requirements by presenting a quantity of documents consisting of: 1) "contracts for the sales of improvements and rights" (sales agreements) which purport to show 99 Sutton's lawful purchase of certain apartment fixtures, physical improvements and occupancy rights from the building's tenant/occupants; and 2) contemporaneous filing forms that 99 Sutton submitted to the Loft Board to memorialize those purchases (sales records). On, March 10, 2017, the Loft Board's counsel issued a report and recommendation that the agency should reject those documents, and March 16, 2017 the Loft Board issued "Order No. 4656" which adopted her recommendation (the original order). *See* petition, exhibits D, E. The original order also denied 99 Sutton's removal order "as premature," and directed 99 Sutton to perform certain additional registrations with the ultimate goal of obtaining a final certification of occupancy (C of O) for the building. *Id.*, exhibit E. 99 Sutton did not file an administrative appeal of the original order.

Instead, on April 27, 2017, 99 Sutton submitted a "reconsideration application" (the reconsideration application) which requested that the Loft Board allow 99 Sutton to present additional documentary evidence and also that the Loft Board review the conclusions that it made in the original order. *See* petition, exhibit F. The Loft Board issued "Order No. 4675" on September 21, 2017 which authorized the reconsideration application, directed that the portion of the original order that rejected 99 Sutton's sales-related contracts "remain in full force and effect," and ordered the Loft Board's staff to issue a determination concerning the sufficiency of those documents. *Id.*, exhibit G. On March 28, 2018, the Loft Board's counsel issued that determination which upheld the rejection of 99 Sutton's contracts (the staff order). *Id.*, exhibit B.

On May 7, 2018, 99 Sutton filed an administrative appeal of the staff order. *See* petition, ¶ 16. Thereafter, on February 21, 2019, the Loft Board issued “Order Number 4852” (the 4852 order), which upheld the staff order. *Id.*, ¶ 3; exhibit A. The 4852 order’s findings of fact and law are too lengthy to reproduce here in full, but the relevant portions will be discussed individually later in this decision. At this point, it is sufficient to note that the 4852 order concludes as follows:

“The Loft Board finds the Determination pertaining to the validity of the Sales Agreements was supported by substantial evidence and properly interpreted the law.

“As to penalties, the Board reverses the imposition of the \$152,000.00 in penalties. An Owner who files a Sales Agreement that is rejected by Staff should not be penalized for failing to timely file the rejected agreement pursuant to 29 RCNY §§ 2-07 (j) and 2-10 (c).

“The Board further notes that Owner has not complied with the Board’s order to legalize the building. Owner has yet to file an alternation application or a narrative statement. Therefore, the Board orders Owner to proceed with legalization of the building immediately. Failure to proceed forthwith may result in further enforcement proceedings and the imposition of penalties.”

*Id.*

Aggrieved, 99 Sutton filed this Article 78 petition on June 17, 2019, and the Loft Board answered on September 6, 2019. *See* petition; verified answer. The matter is now fully submitted and ready for judicial review (collectively, motion sequence number 001).

#### DISCUSSION

This decision only concerns the first of the three findings set forth in the 4852 order; i.e., the portion that upheld the Loft Board’s rejection of 99 Sutton’s sales agreements and sales records. The 4852 order’s second finding, which reversed the portion of the staff order

upholding the assessment of penalties against 99 Sutton, is not contested by either of the parties. See verified answer, ¶ 349. The third finding, which directed 99 Sutton to perform certain registrations to advance the building's legalization process and obtain a final C of O, is a non-final order that is not subject to review in an Article 78 proceeding (and is also unchallenged). See e.g., *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 221 (1<sup>st</sup> Dept 2002). This proceeding is premised on 99 Sutton's assertions that: 1) its sales agreements and sales records satisfied the governing laws and regulations; and 2) the Loft Board improperly found that they do not. However, both of these claims are problematic.

By way of legal background, MDL § 286 (6) provides that:

“Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value. Upon purchase of such improvements by the owner, any unit subject to rent regulation solely by reason of this article and not receiving any benefits of real estate tax exemption or tax abatement, shall be exempted from the provisions of this article requiring rent regulation if . . . [it was] rented at market value subject to subsequent rent regulation if such building had six or more residential units at such time. The Loft Board shall establish rules and regulations regarding such sale of improvements which shall include provisions that such right to sell improvements may be exercised only once for each unit subject to this article, and that the opportunity for decontrol or market rentals shall not be available to an owner found guilty by the loft board of harassment of tenants.”

MDL § 286 (12) further provides that:

“No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit.”

The relevant Loft Board rules and regulations that govern the sales of rights and improvements to

a loft apartment are set forth in 29 RCNY § 2-10 (b), and provide as follows:

“For a sale of rights in a unit subject to Article 7-C pursuant to (i) MDL § 281 (1), which occurs on or after March 16, 1990, (ii) MDL § 281 (4), which occurs on or after November 23, 1992, or (iii) MDL § 281 (5), which occurs on or after September 11, 2013 the effective date of this amended rule, the owner or authorized representative must file with the Loft Board a sales record on the Loft Board approved form (‘sales record form’) within 30 days of the sale, together with the sales agreement, if any, or any other documentation substantiating the sale.

“The Loft Board’s approved form must be signed by the owner or its authorized representative and the occupant and his or her authorized representative, if any, who sold rights to the unit. If the occupant refuses to sign the form, the owner or its authorized representative must file with the form a sworn statement identifying the occupant, the reasons given by such occupant for refusing to execute the form and proof of the sale of rights, including supporting documentation. If the prior occupant could not be found, the owner or its representative must provide a description of the reasonable efforts used to locate the occupant and must file proof of the sale of rights including supporting documentation.

“Except as provided in paragraph (c) below, failure by the owner or the owner’s authorized representative to file a sales record form within 30 calendar days of the date of the sale may subject the owner to a civil penalty as determined by the Loft Board in § 2-11.1 of the Loft Board Rules.”

The court’s role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). A determination is only deemed arbitrary and capricious if it is “without sound basis in reason, and in disregard of the . . . facts.” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational

basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

As indicated, the part of the 4852 order being challenged in this proceeding is the conclusion that “[t]he Loft Board finds the [staff order] was supported by substantial evidence and properly interpreted the law.” See petition, exhibit A. The Loft Board asserts that the administrative record afforded it a rational basis from which to conclude that the staff order was correctly decided. See respondent’s mem of law at 10-24. However, 99 Sutton’s petition contests each of the seven findings that the Loft Board made in the 4852 order while reaching its conclusion, and argues that the (challenged portion of the) 4852 order was instead an arbitrary and capricious ruling, since (one or more of) the Loft Board’s findings were erroneous. See petition, ¶¶ 27-216. The court will review point in turn.

First, 99 Sutton argues that “reliance on a new justification for denying petitioner a new hearing constitutes an impermissible *post hoc* rationalization.” See petition, ¶¶ 27-36. 99 Sutton specifically asserts that:

“subsequent to the submission . . . of additional evidence and arguments concerning the alleged deficiencies [in the sales applications], the Loft Board apparently was of the opinion that [99 Sutton] overcame any alleged deficiencies . . . since the [staff order] . . . affirmed by the [4852 order] shied away from any and all of said alleged deficiencies, and instead crafted an entirely new set of objections as to why the sales agreements should be rejected in its apparent quest to summarily deny [99 Sutton’s] sales agreements.”

*Id.*, ¶ 28. The Loft Board responds that “the [4852 order] does not contain an ‘impermissible post hoc rationalization’” because “[99 Sutton] itself requested the more detailed analysis in the reconsideration application that gave rise to the [staff order] and the [4852 order];” and also

asserts that the case law which 99 Sutton cited in support of its argument is factually inapposite. *See* respondent's mem of law at 24-27. After review, the agrees with both assertions.

The administrative record shows that: 1) on May 5, 2015, 99 Sutton filed copies of 32 sales agreements with the Loft Board, but neglected to attach the agency approved "sales record forms" to its filing; 2) later, on June 23, 2015, 99 Sutton filed 33 "sales record forms"; 3) on August 12, 2015, 99 Sutton filed its official removal application; 4) on March 1, 2016, after having attending a conference at which the Loft Board raised concerns about the adequacy of its submissions, 99 Sutton made a supplemental filing of five more sales agreements and sales record forms; 5) on March 10, 2017, the Loft Board's general counsel issued a recommendation that the removal application be denied on the grounds that (i) the building was not in compliance with its certificate of occupancy (C of O) and (ii) 99 Sutton's sales submissions were inadequate; 6) on March 16, 2017, the Loft Board issued the original order; 7) on April 27, 2017, 99 Sutton filed its reconsideration application; 8) on September 17, 2017 the Loft Board partially granted the reconsideration application; 9) on November 2, 2017, 99 Sutton filed a supplementary document submission (which included sales agreements, sales record forms and affidavits from two of its officers); 10) on March 28, 2018, the Loft Board issued the staff order; 11) on May 9, 2018, 99 Sutton filed an application to appeal the staff order; and 12) on February 26, 2019, the Loft Board issued the 4852 order. *See* verified answer, ¶¶ 177-349; exhibits A-L.

This procedural history demonstrates that, after the original order rejected 99 Sutton's sales agreements and sales records, the Loft Board granted 99 Sutton's reconsideration application (on September 17, 2017), but then nevertheless upheld its rejection for the reasons stated in the staff order. From this, it is clear that the arguments that were disposed of in the

4852 order pertained to the findings that were made in the staff order, and *not* to those which had been made in the original order. In other words, the 4852 order was an administrative appeal decision that reviewed the findings contained in the *second* (staff order) rejection, and *not* those set forth in the *first* (original order) rejection. There was no need for the 4852 order to discuss the findings of the original order at all, since 99 Sutton only appealed the staff order. Indeed, 99 Sutton's decision to file a reconsideration application after the Loft Board entered the original order could be construed as an acknowledgment that its documents were inadequate. This is so because that filing shows that 99 Sutton both recognized the need, and requested the opportunity, to make additional submissions to overcome the agency's finding of inadequacy.<sup>1</sup> In any case, the Loft Board's decision to consider 99 Sutton's sales agreements a second time did not happen in a vacuum. The 4852 order specifically found as follows:

"In [the original order], the [Loft] Board rejected the filings due to irregularities and incompleteness. In the request for reconsideration, [99 Sutton] asserted that the [Loft] Board did not give enough specifics to inform [99 Sutton] as to why some of the filings were rejected. Per the [Loft] Board's directive, the [staff order] points out, in great detail, the irregularities in [99 Sutton's] filings, including inadequate consideration, incomplete, missing or deficient Sales Agreements for all units, vague and confusing emails in support of [99 Sutton's] claim that it made efforts to locate tenants, and lack of occupancy of certain alleged tenants at the time of the alleged sales. It also specifically identifies where those filings are incomplete, pointing to the unsigned sales forms, missing sales forms, incomplete vacatur affidavits and self-serving affidavits lacking supporting documentation. . . . Thus, the [staff order] was supported by substantial evidence and properly applied the law."

*Id.* The court finds that 99 Sutton's current argument about an "impermissible post hoc rationalization" is merely a continuation of its willful misreading of this case's procedural

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<sup>1</sup> As was observed in the 4852 order, 99 Sutton's counterintuitive suggestion that, by permitting the reconsideration request, the Loft Board had somehow *acceded* to the validity of 99 Sutton's disputed sales agreements "was wrong." See verified answer, exhibit A.

history. 99 Sutton appealed the staff order, *not* the original order. The fact that the 4852 order discussed arguments that were not considered in the original order is neither relevant nor to be much wondered at. 99 Sutton's disingenuous argument is a "red herring" which the court rejects.

The court also finds that the Loft Board correctly determined that the legal precedents which 99 Sutton cited to support its "post hoc rationalization" argument were all inapposite. The 4852 order specifically discussed each of the eight holdings that 99 Sutton cited in its appeal, and found that none of them applied to the facts of this case. *See* verified answer, exhibit A. 99 Sutton's Article 78 petition again cited these same eight cases and urged that the Loft Board misread them. *See* petition, ¶¶ 30-36. The Loft Board responds that the rulings "cited in the petition have no bearing upon the matter at hand." *See* respondent's mem of law at 24-27. After reviewing the eight subject cases, the court agrees that the 4852 order correctly found that their holdings are inapposite.

Four of the aforementioned cases involved Article 78 petitions that challenged orders which were "final administrative determinations." *See e.g., Matter of Centennial Restorations Co. v Abrams*, 180 AD2d 340 (3d Dept 1992); *Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 284 (1<sup>st</sup> Dept 2001); *Matter of Peckham v Calogero*, 54 AD3d 27 (1<sup>st</sup> Dept 2008), *affd* 12 NY3d 424 (2009); *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 (1<sup>st</sup> Dept 2011). However, the Loft Board found that the 4852 order did *not* constitute a "final administrative determination." *See* verified answer, exhibit A. Instead, the 4852 order simply upheld the staff order, which the Loft Board did not consider a "final administrative determination" either. *Id.*, exhibit B. This is because the Loft Board had issued the staff order - in response to 99 Sutton's reconsideration request - primarily to amplify the

portion of the original order which rejected 99 Sutton's sales agreements. While it is true that the original order also denied 99 Sutton's removal application, it did so on the ground that that application "was premature," and thereby afforded 99 Sutton the opportunity to resubmit it later. *Id.*, exhibit C. As a result, the March 16, 2017, which gave rise to both the staff order and the 4852 order, does not constitute a "final administrative determination" of 99 Sutton's removal application, and the four cases that 99 Sutton cited on this point are inapposite.

Two of the other cases that 99 Sutton cited involved Article 78 petitions that challenged agency orders that were partially based on material that was not part of the administrative record. *See Matter of Simpson v Wolansky*, 45 AD2d 876 (2d Dept 1974), *affd* 38 NY2d 391 (1975); *Ndaw v City of New York ECB*, 2013 NY Slip Op 31012 (U) (Sup Ct, NY County 2013). One dealt with an appeal of a trial court ruling on a petition in which the trial court cited material from the record that the administrative agency had not relied on. *See Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314 (1<sup>st</sup> Dept 2007), *affd* 10 NY3d 346 (2008). However, the 4852 order clearly recites that it is based *solely* on the evidence that the parties had submitted as part of the administrative review of 99 Sutton's removal application, and it also identified each of each item of evidence. *See* verified answer, exhibit A. Therefore, the court again finds that the cases which 99 Sutton cited on this point are inapposite.

Finally, 99 Sutton cited one decision that overturned an agency ruling on due process grounds where the agency had denied the applicant the opportunity to submit certain necessary evidence. *See Matter of Wilson v N.Y.C. Police Dept. License Div.*, 38 Misc 3d 928 (Sup Ct, NY County 2012), *revd* 115 AD3d 552 (1<sup>st</sup> Dept 2014). Here, however, the 4852 order found that 99 Sutton had no grounds to raise a due process objection, since the Loft Board had granted the

reconsideration application specifically to *allow* 99 Sutton to submit additional evidence. *See* verified answer, exhibit A. It did not preclude 99 Sutton from making any submissions. The court thus agrees with the Loft Board's conclusion that the *Wilson* holding does not apply, since 99 Sutton suffered no denial of due process.<sup>2</sup> Because the court agrees with the Loft Board's finding that all of the case law reviewed in the 4852 order was inapposite, the court rejects 99 Sutton's "impermissible post hoc rationalization" argument in full.

Next, 99 Sutton argues that the "sellers [of rights to the building's apartments] do not need to be residential occupants at the time of the sale." *See* petition, ¶¶ 37-49. 99 Sutton derives this argument from the language of 29 RCNY 2-10 (a) (1), which states that "[t]he residential occupant of an IMD unit may sell the rights afforded such occupant pursuant to Article 7-C, to the owner of the IMD . . . , in accordance with the terms of MDL § 286 (12) and these rules." 99 Sutton asserts that the term "residential occupant" should be construed to mean both current and prior apartment tenants since other portions of 29 RCNY differentiate between the two, while § 2-10 (a) (1) does not. *See* petition, ¶¶ 37-49. In the 4852 order, the Loft Board found that "this argument demonstrates a deep misunderstanding of the Loft Law and how it relates to rent regulation." *See* verified answer, exhibit A. In its current memorandum of law, the Loft Board asks the court to accept the agency's interpretation that a sale of rights under 29 RCNY 2-10 (a) (1) may only be made by the tenant who resides in the unit at the time of the sale. *See* respondent's mem of law at 19-21. The court does so. Firstly, "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or

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<sup>2</sup> The court also notes that the Appellate Division, First Department, later reversed *Matter of Wilson v N.Y.C. Police Dept. License Div.* on other grounds. 115 AD3d 552 (1<sup>st</sup> Dept 2014).

irrational.” *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1<sup>st</sup> Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Secondly, the Appellate Division, First Department, has ruled that MDL § 286 (12) - the statute that is enabled by RCNY 2-10 - “applies only to the purchase of an occupant’s Loft Law rights.” *Acevedo v Piano Bldg. LLC*, 70 AD3d 124, 127 (1<sup>st</sup> Dept 2009) (emphasis added). The Court specifically noted that

“The statute says nothing about rent stabilization or ETPA; it says nothing about any subsequent tenant’s rights; indeed, it says nothing about deregulating units in any way whatsoever. The purchase of rights permitted in this section is thus necessarily limited to an occupant’s rights under the Loft Law.”

*Id.* 99 Sutton’s petition does not address this holding, nor does it identify any contrary authority to support its preferred interpretation of 29 RCNY 2-10 (a) (1). As a result, the court agrees that 99 Sutton’s interpretation is not reasonable, and finds that the portion of the 4852 order that rejected that interpretation was correct.

Next, 99 Sutton argues that it “demonstrated reasonable efforts to locate former occupants.” *See* petition, ¶¶ 50-64. This bald statement is an improper argument since it challenges the Loft Board’s findings of fact, rather than asserting that there was no basis in the administrative record from which to draw those findings. Therefore, the court rejects it. For its part, the Loft Board averred that “the court should uphold the . . . determination that [99 Sutton] did not demonstrate reasonable efforts to contact the purported sellers to submit documentation of a full and intentional sale of rights.” *See* respondent’s mem of law at 21-24. The court notes that the relevant portion of 29 RCNY § 2-10 (b) provides that “[i]f the prior occupant could not be found, the owner or its representative must provide a description of the reasonable efforts used

to locate the occupant and must file proof of the sale of rights including supporting documentation.” The 4852 order found that “what constitutes reasonable efforts is for the [Loft] Board to determine,” and noted that although “this is a case of first impression . . . the . . . abandonment rule, 29 RCNY § 2-10 (f), contains a similar term, ‘affirmative efforts’” and concluded that “staff properly looked to precedent interpreting that term for guidance.” *See* verified answer, exhibit A. The Court of Appeals passed on the issue of judicial review of administrative rule-interpretation in *In Matter of Lantry v State of New York* (6 NY3d 49, 58 [2005] [citation omitted]), where it observed that: “[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.” 99 Sutton’s papers did not argue this point directly, but they did cite several Loft Board decisions on the issue of “affirmative efforts,” and then allege that the 4952 improperly disregarded these decisions. *See* petition, ¶¶ 50-64. Thus, 99 Sutton raised the “inconsistency” argument indirectly. Nevertheless, the court finds that 99 Sutton’s argument fails. The 4852 order analyzed each of the cited agency decisions also, and concluded that most of them were *not* binding precedent since they were merely findings by administrative law judges, rather than final Loft Board determinations (which would have precedential value before the agency). The only decision that was a final determination, *Kent Ave. Holdings, LLC* (Loft Board Order NO. 4442 [Nov. 30, 2015]), involved an owner whose attempts to locate its former tenants consisted of activity similar to that undertaken by 99 Sutton herein (i.e., emails and mailings) In *Kent*, the Loft Board ruled that such activity was inadequate and does not rise to the level of “affirmative efforts.” 99 Sutton’s papers contest the logic of the Loft Board’s ruling in *Kent*, however they do not identify any other

binding Loft Board decisions that it is inconsistent with. Therefore, the court rejects both 99 Sutton's "reasonable efforts" claim and its "inconsistency" argument.

Next, 99 Sutton argues that "the sales agreements were sufficient to establish that the tenants sold their Article 7-C rights." *See* petition, ¶¶ 65-80. This also appears to be an improper factual challenge. However, 99 Sutton's papers disclose that it actually contests the portion of the 4852 order which upheld the staff order finding that the contractual language in the 99 Sutton's sales agreements was too "confusing" to constitute proof "that a tenant [had] voluntarily and intentionally relinquished a known right." *See* verified answer, exhibits A, B. Thus, 99 Sutton's argument is really a dispute about contractual interpretation. In the 4852 order, the Loft Board ruled that the staff order's finding that 99 Sutton's sales agreements contained impermissibly vague and/or confusing language was "reasonable," as a matter of law, because those documents (a) did not refer to the Loft Law, or (b) specify which apartment-related rights to which the owner's purchase applied. *Id.* 99 Sutton asserts that this was not a reasonable conclusion to reach, since the text of the sales agreements did mention the phrase "tenant's rights and improvements" in several places. *See* petition, ¶¶ 65-80. 99 Sutton also asserts that the Loft Board's finding of "confusion" was based on the affidavit of a single tenant, and that that affidavit constituted "extrinsic evidence" which the Loft Board should not have considered. *Id.* The Loft Board's opposition papers aver that the staff order and the 4852 order both interpreted the language of the sales agreements in a reasonable manner, and deny any improper reliance on "extrinsic evidence." *See* respondent's mem of law at 15-17. Instead, the Loft Board notes that the administrative record did include email correspondence between 99 Sutton and a number of former tenants, all of whom expressed confusion about the content and/or legal effect of the sales

agreements. *Id.* For its part, the court notes that the Appellate Term, First Department, has upheld Loft Board rejections of sales agreements that didn't identify which specific apartment "improvements" to which the agreements were intended to apply. *See BR 31, LLC v Landess*, 57 Misc 3d 156 (A), 2017 NY Slip Op 51644(U) (App Term 1<sup>st</sup> Dept 2017). The Appellate Term has also found that sales agreements which contain "amorphous language" that does not indicate exactly what consideration to which a building owner's purchase price applies are too vague to be enforced. *See 73 Tribeca LLC v Greenbaum*, 44 Misc 3d 16, 2014 NY Slip Op 24052 (App Term 1<sup>st</sup> Dept 2014). Here, the administrative record shows that 99 Sutton's sales agreements did *not* mention the Loft Law or refer to any of its subsections, but that those agreements did indicate that the contractual purchase price could apply to items *other* than "a tenant's rights and improvements." *See* verified answer, exhibits A, B; petition, exhibits R, S, T, U.<sup>3</sup> For example, the sales agreements stated that the purchase price also applied to "any claims [a] tenant may have against [99 Sutton, including] . . . recovery of . . . security deposits [and] other fees and credits," items that the Loft Board correctly notes are *separate* from the "fixtures and improvements" whose sale is authorized by MDL § 286. *Id.* In light of the above Appellate Term precedent, the court concludes that the Loft Board's determination in the 4852 order that 99 Sutton's sales agreements were too vague to be enforced was a correct reading of the law.

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<sup>3</sup> The court notes that both the 4852 order and the staff order included excerpts of the challenged contractual language. *See* verified answer, exhibits A, B. 99 Sutton annexed redacted copies of some of the sales agreements to its petition. *See* petition, exhibits R, S, T, U. However, the Loft Board notes that 99 Sutton did not present these documents at the agency hearing, so they were not actually part of the administrative record. *See* respondent's mem of law at 29. The court only mentions them in this decision because it is evident that there is no difference between the language contained in those contracts and that which the Loft Board excerpted in its decisions.

Therefore, the court rejects 99 Sutton's "sufficiency" argument.

Next, 99 Sutton argues that "it was error for the Loft Board to find that the sales agreements are tainted due to alleged prior misrepresentations made by owner's officers 18 years ago." See petition, ¶¶ 81-95. The 4852 order states that the staff order was correct to include consideration of certain misrepresentations that officers of 99 Sutton had made in submissions to the Loft Board in a previous matter (*Matter of 25 Jay Street, LLC* [Loft Board Order No. 4656]) as part of its evaluation other submissions that the same corporate officers made in the current matter. See verified answer, exhibits A, B. 99 Sutton argues that doing so constituted "reversible error." See petition, ¶ 86. However, to support that assertion, 99 Sutton only cites *Matter of Bigelow v Board of Trustees of Inc. Vil. of Gouverneur* (63 NY2d 470 [1984]), a Court of Appeals decision reviewing an Article 78 challenge to the procedural propriety of a disciplinary hearing against a police officer that was conducted pursuant to Section 75 of the Civil Service Law. That holding is clearly inapposite because this case does not involve the Civil Service Law. It therefore provides no support for 99 Sutton's position. For its part, the Loft Board asserts that "it is permissible for an agency to consider past interactions between the individual and the agency in making a determination." See respondent's mem of law at 27-28. Although the Loft Board's memorandum of law does not mention them,<sup>4</sup> the court notes that the 4852 order correctly cited well-settled appellate case law recognizing the rule that administrative

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<sup>4</sup> Instead, the Loft Board cited *Matter of Swartz v New York State Dept. of Educ.* (135 AD2d 1002, 1003 [3d Dept 1987]) for the rule that "[i]t is not error for an administrative body to consider prior misconduct when imposing a penalty." At worst, that decision is as inapposite as the one that 99 Sutton cited. At best it raises a moot argument, since the 4852 order reversed the portion of the staff order which had assessed penalties against 99 Sutton. In any case, the court disregards it in favor of the case law that was actually cited in the 4852 order.

agencies are permitted to reconsider previously-issued determinations on the grounds of “illegality, irregularity in vital matters, or fraud.” See *Gersten v 56 7th Ave. LLC*, 88 AD3d at 204; *Matter of Centennial Restorations Co. v Abrams*, 180 AD2d at 344, citing *People ex rel. Finnegan v McBride*, 226 NY 252, 259 (1919). Based on this rule, the court finds that there was nothing improper about the Loft Board considering 99 Sutton’s past acts, and therefore rejects this argument

99 Sutton also argues that “the Loft Board fails to establish the existence of fraud.” See petition, ¶¶ 96-100. This argument merely restates 99 Sutton’s previous “misrepresentations” argument. The court therefore rejects it for the same reasons as above.

Finally, 99 Sutton argues that “the additional reasons provided by the Loft Board for rejecting each filing are without merit,” and supplements this argument with factual allegations specific to 37 of the building’s apartment units. See petition, ¶¶ 101-216. This argument is plainly an improper attempt to relitigate the factual findings underlying the determinations in both the original order and the staff order to reject 99 Sutton’s sales agreements and sales records for non-compliance with 29 RCNY § 2-10 (b). However, as previously noted, this Article 78 proceeding only concerns the 4852 order, and *not* either of those two previous orders. On the issue of the sufficiency of 99 Sutton’s sales-related filings, the 4852 order did *not* undertake an apartment-by-apartment analysis of each document, as the staff order had. Instead, it simply found that there was an adequate evidentiary basis in the administrative record to support the staff order’s conclusion. This court’s role in this Article 78 proceeding is to determine whether the Loft Board applied the correct legal principles in reaching its decision, and *not* to undertake its own independent factual analysis of the case, as 99 Sutton would have it do. *Matter of Pell v*

*Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Instead, the court rejects 99 Sutton's unduly long, burdensome final argument on the ground that "the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; \* \* \* the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence.'" *Id.*, at 230-231 (internal citations and quotation marks omitted). Here, 99 Sutton does not raise the issue of "substantial evidence." Further, because 99 Sutton failed to identify *any* sales-related submissions in the sizable administrative record that were compliant with 29 RCNY § 2-10 (b), there are no grounds to gainsay the Loft Board's conclusion that that record provided a rational basis for the staff order. As a result, the court rejects 99 Sutton's final argument.

To sum up, the court finds that 99 Sutton has failed to rebut any of the eight findings that the Loft Board made in the 4852 order, or to cast doubt on the Loft Board's conclusion that there was a "rational basis" for the 4852 order. Therefore, the court denies this Article 78 petition.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner 99 Sutton LLC (motion sequence number 001) is denied and the proceeding is dismissed, and the Clerk of the Court shall enter Judgment accordingly. And it is further

ORDERED that counsel for petitioner shall serve copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondent,

Dated: New York, New York  
December 11, 2019

ENTER:



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMEAD**  
**J.S.C.**