156 W. 15th St. Chelsea L.L.C. v City of New York
2020 NY Slip Op 30033(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 153126/2019
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART 5**

Justice

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INDEX NO. 153126/2019

156 WEST 15TH STREET CHELSEA L.L.C.
Petitioner,

MOTION SEQ. NO. 001; 002

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

DECISION + ORDER ON MOTION

- against -

CITY OF NEW YORK,
Respondent.

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The following e-filed documents, listed by NYSCEF document number 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75 , 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for **ARTICLE 78/ SUMMARY JUDGMENT**.

Petitioner, 156 West 15th Street Chelsea L.L.C., commenced this Article 78 proceeding seeking an order to annul and vacate the determination of the New York City Environmental Control Board ("ECB") to sustain the decisions and orders rendered by Office of Administrative Trials and Hearings ("OATH") Hearing Officers on May 4, 2018 and May 10, 2018 regarding violations of the New York City Administrative Code ("AC") and the New York City Building Code ("BC").

Petitioner is the owner of an apartment building located at 156 West 15th Street, New York N.Y. (See *Respondent's Exhibit A*.) Pursuant to the Certificate of Occupancy ("CO") No. 113013, the 1st, 3rd, and 4th floors of the building are each designated as J-2 occupancy with 7 Class "A" apartments and the 2nd floor is designated as both J-2 and J-1 with 2 Class "A" apartments and 1 Class "B" sleeping room. (See *Respondent's Exhibit N*.) The J-2 occupancy group restricts occupancy of individuals for shelter and sleeping accommodations to a month-to month or longer-term basis. The J-1 occupancy group permits occupancy of individuals for shelter and sleeping accommodations on a day-to-day or week-to-week basis. Consequently, only the single Class "B" sleeping room on the 2nd floor allows occupancy of individuals for shelter and sleeping accommodations on a day-to-day or week-to-week basis.

On March 7, 2017, the New York City Department of Buildings ("DOB") issued three summonses to petitioner for illegally using/converting the use of Apartments 2C; 3A; 4A; and 2B to transient use in violation of AC 28-210.3 (Notice of Violation [NOV] 352220647N); failing to provide the required number of egress for every floor per BC § 1018.1 and AC § 27-366 in violation of AC § 28-301.1 (NOV 35220648P) and failing to provide a fire alarm system for transient use per BC § 907.2.8 (NOV 35220649R). Thereafter, on September 22, 2017, DOB issued three additional summonses to petitioner for similar allegations in Apartments 2B; 1A; 1D; 2C; 4A; and 3A permanent dwelling illegally used/converted to transient use in violation of AC § 28-210.3 (NOV 35292709M); failure to provide required means of egress for every floor per BC § 1018.1 and AC § 27-366 in violation of AC § 28-301.1

(NOV 35292710J); and failure to provide fire alarm system in violation of BC § 907.2.8 (NOV 35292711J).

On April 26, 2018,[1] a hearing was held for the first set of summonses issued on March 7, 2017 (summonses ending in 47N, 48P, and 49R). At the hearing, the Issuing Officer (IO) testified that he was able to gain access to four separate apartments, spoke with an individual from each apartment who stated that they were temporarily staying in the apartment, booked via the "Airbnb" website, and were paying various amounts [to rent the premises] per night.

In response, petitioner argued that the summonses should be dismissed on the grounds that OATH and ECB refuse to enforce the United States Constitution, as well as, provisions of state and local laws; that the City of New York incorrectly holds property owners strictly liable for the actions of their tenants; that the structure of the OATH Appeals Unit and the use of ECB Commissioner's reviewers create due process conflicts; penalties are excessive; hearings are conducted behind closed doors; the premises are not subject to the 2008 BC; the inspection of the cited locations was illegal; and lack of jurisdiction. Petitioner did not contest the allegations contained within the summonses.

On May 4, 2018, Hearing Officer Susan Brand rendered a decision crediting respondent's evidence and finding that petitioner failed to rebut the allegations and that there existed indicia of transient use. Hearing Officer Baran found petitioner in violation of the charges outlined in summonses 47N, 48P, and 49R and ordered the maximum daily penalties of $1000.00 per day for forty-five (45) days along with standard penalties, as there was no evidence of correction.

Additionally, on April 19, 2018, a hearing was held for summons 35292709M. At the hearing, petitioner raised similar grounds for dismissal, along with objections to respondent's evidence. Specifically, petitioner argued that the IO's affidavit and photographs should be excluded because he was not present at the hearing for cross-examination; the summons fail to establish a *prima facie* case; the hearing officer must reopen two other defaulted cases[2] and adjudicate them in concert; OATH ran a "kangaroo court" because it failed to recognize constitutional issues; respondent failed to respond to a discovery request; transient use has no legal definition and is based on a fabricated legal theory; and occupancy groups found in the 2008 BC have no application to the subject building which was constructed in 1910.

In addition, petitioner provided a certificate of correction, dated September 25, 2017, and approved by respondent on October 4, 2018, indicating that the violation had been corrected. On May 10, 2018, Hearing Officer Joan Silverman rendered a decision finding petitioner in violation of AC § 28-210.3 and ordered daily penalties of $1000.00 per day from September 23, 2017 through September 25, 2017, as petitioner conducted a timely correction as evidenced by the approved certificate of correction.

Subsequently, petitioner filed an appeal[3] of the Hearing Officer's May 4, 2018 decision, which DOB opposed.[4] Thereafter on November 8, 2018, the ECB affirmed the OATH decision. Specifically, the ECB held that the petitioner failed to establish a defense to the charge or otherwise identify a valid

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[1] The hearing was continued from March 8, 2018 (adjourned due to time constraints).
[2] Petitioner received default penalties for summonses numbers 35292710J and 35292711J, also issued on September 22, 2017.
[3] It is unclear when the appeal was filed as petitioner's appeal documents are dated April 26, 2018, and petitioner submitted an appeal extension which respondent approved on July 11, 2018, granting petitioner until August 10, 2018 to submit his appeal. (See *Respondent's Exhibits R; S.*)
[4] See *Respondent's Exhibits S; T.*

basis to modify the Hearing Officer's decision. Additionally, as to petitioner's constitutional claims, due process and First and Fourth Amendment violations, ECB, citing various prior administrative decisions, determined that the Board has no authority to review DOB's enforcement practices or validity of search warrants obtained by DOB to inspect particular premises. Further, ECB found that a premises owner's purported ignorance of its tenant's short-term rental activities is not a defense; several jobs were filed at the cited premises to change the use or occupancy of the premises including a job in 2013 thus, the 2008 BC applies to petitioner; and petitioner failed to establish grandfathering as an affirmative defense.

Petitioner also filed an appeal[5] of the Hearing Officer's May 10, 2018 decision. Thereafter on November 29, 2018, ECB sustained the OATH decision finding that the hearing officer properly overruled petitioner's objections as relevant and reliable evidence may be admitted without regard to formal rules of evidence per 48 RCNY §6-12(c); it was within the hearing officer's discretion to continue the hearing without the issuing officer present per 48 RCNY §6-14 and petitioner failed to move ECB seeking the officer's presence or stating grounds for same; petitioner did not offer any evidence that the defaulted cases were restored thus, the remaining summonses could not be adjudicated. (48 RCNY §§ 6-19 and 6-21(a)). Additionally, the ECB determined that petitioner's argument that the 1910 construction of its building exempts it from occupancy violations lacks merit as buildings pre-existing the 2008 BC are still governed by it (AC §27-103). Moreover, petitioner's argument as to OATH holding property owners strictly liable for acts committed by their tenants lacks merit as petitioner failed to offer evidence or argument that his tenant caused the violation and the hearing officer did not find same. Lastly, the ECB, citing to prior decisions, held that the OATH Hearings Division is not the proper tribunal for adjudication of constitutional claims, nor is the Board itself, and that petitioner failed to raise defenses as to the merits of the violation.

Now, petitioner seeks judicial review of the ECB's decisions affirming Hearing Officers' Brand and Silverman May 4, 2018 and May 10, 2018 decisions, respectively. Petitioner argues that the ECB decisions upholding the OATH determinations were "arbitrary, capricious, unreasonable, unlawful and contrary to the provisions of the Constitution of the United States and the State of New York, statutes, laws, ordinances, rules and regulations..." In support, petitioner reasserts all the arguments proffered in its appeals and contends that petitioner did not get a fair or full hearing regarding factual and legal constitutional issues.

Respondent opposes the petition arguing that the Hearing Officers' decisions were reasonable, rational, and not contrary to law and thus, the ECB's decision to sustain same was reasonable, rationale, and not contrary to law. Respondent further argues that petitioner failed to pursue and exhaust its administrative remedies for summonses 35292710J and 35292711J as petitioner failed to appear for the November 9, 2017 hearing or move to vacate its default concerning same.[6] Additionally, respondent contends that despite assertions to the contrary, building owners have a non-delegable responsibility to maintain their buildings in a code-compliant manner,[7] and petitioner's constitutional challenges were appropriately declined as the City Charter clearly enumerated the types of laws and regulations OATH is entitled to enforce (City Charter §1049-a(d)) and an Article 78 proceeding is sufficient to address any constitutional claim against an administrative agency. See *Patterson v Labella*, No. 6:12-CV-01572

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[5] Petitioner submitted an appeal extension of all summonses issued on September 22, 2017 which was approved on July 18, 2018, as to summons 35292709M only. In a letter dated July 25, 2018, petitioner was advised of the procedure to request a new hearing for the defaulted summonses; to wit: summons 35292710J and summons 35292711J.

[6] On November 16, 2017, notice of default orders were mailed to the petitioner. (See *Respondent's Exhibit DD.*)

[7] Respondent cites *Guzman v Haven Plaza Housing Dev Fund Co*, 69 NY2d 559 (1987); *Weiss v City of New York*, 16 AD3d 680, 681 (2d Dept 2005); *Matter of Pamela Equities Corp v Environmental Control Bd of the City of New York*, 59 Misc 3d 1007,1013 (Sup Ct, NY County, Oct. 12, 2017)

(MAD/TWD) [ND NY, Sept 30, 2014], citing *Grillo v NY City Transit Authority*, 291 F3d 231, 234 (2d Cir 2002; see also *Verri v Nanna*, 20 F Supp 2d 616, 622 (SDNY 1998).

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. (See *CPLR § 7803[3]*; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). In a special proceeding pursuant to 22 NYCRR §202.57, the scope of judicial review is limited to whether the Division's determination was arbitrary, capricious, or lacking a rational basis. (*McFarland v New York State Div. of Human Rights*, 241 AD2d 108 [1st Dept 1998]).

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. (AC §28-210.3). A class A multiple dwelling is a multiple dwelling that is occupied for permanent residence purpose. (AC §27-2004). Permanent residence purposes are defined as occupancy of a dwelling unit by the same natural person, family, house guests, lawful boarders, roomers or lodgers for thirty consecutive days or more. *Id.* As an exception, non-permanent occupants can stay for fewer than thirty consecutive days provided there is no monetary compensation paid to the permanent occupants for such occupancy. *Id.* The owner of a building shall maintain it and all parts thereof in a safe and code-compliant manner. (AC §28-301.1). An automatic smoke system shall be installed in any Group R-1 occupancy. (BC §907.2.8.) Group R-1[8] occupancy is defined as transient (less than thirty consecutive days) occupancy. (AC §27-237).

As an initial matter, this court finds that based upon petitioner's assertions and the arguments advanced, this petition is properly before this court as the question presented is whether the ECB's decision to uphold the determinations of OATH Hearing Officer Brand and Silverman was arbitrary and capricious.

Upon review of the papers submitted, this court finds that the ECB's decision to affirm the May 4, 2018 and May 10, 2018 determinations was rational and reasonable. It is undisputed that a number of apartments in petitioner's building were converted/used for non-permanent residential purposes. In fact, during the OATH hearing on April 19, 2018, the petitioner submitted an approved certificate of correction to establish that illegal use ceased three days after summons ending in 09M was issued. The rules pertaining to illegal use are straight forward. The ECB's decision to sustain the May 4, 2018 and May 10, 2018 decisions was not arbitrary and capricious as Hearing Officer Brand and Hearing Officer Silverman's decisions were based upon petitioner's undisputed violations of the law, public policy concerns, and precedent within the administrative forum. In reaching a decision, the hearing officers relied upon the allegations made by the Issuing Officer, the evidence proffered by respondent, namely, the certificate of occupancy, and screenshots of the respective Airbnb reservations.

The gravamen of petitioner's application is that OATH and ECB deprived petitioner of its constitutional rights and thus, ECB's decision to affirm the OATH determinations was arbitrary and capricious. The court likewise finds this argument unavailing as petitioner does not dispute the merits of the violation, and, as respondent correctly contends, an Article 78 proceeding provides an adequate post-deprivation forum in which petitioner's constitutional arguments can be raised or addressed. *Hellenic Am*

[8] R-1, describing the residential occupancy group for hotels, etc. under the 1968 code is also known as J-1 in all subsequent codes.

Neighborhood Action Comm v City of New York, 101 F3d 877, 881 (2d Cir 1996). With regard to petitioner's constitutional allegations, the court finds that the record before the court is devoid of any facts to support a violation of petitioner's rights. Petitioner, a corporate entity, has not proffered any evidence of an agent, corporate owner, or any other representative that was present on the date that the violations were issued that can establish that respondent violated its constitutional protections under the Fourth and Fourteenth Amendments. As to petitioner's contentions concerning a violation of its due process rights, the record supports a finding to the contrary as the petitioner was afforded multiple opportunities to be heard and failed to appear at a scheduled hearing, failed to vacate its default as to two summonses, and where the Issuing Officer was not present, the petitioner failed to request same. Thus, where procedural protections have been made available and the petitioner has declined himself of same respondent cannot be held liable. *Broadway & 67th St Corp v New York*, 100 AD2d 478, 484-485 (1st Dept 1984).

Accordingly, the Environmental Control Board's decision was rational and reasonable and not arbitrary or capricious. It is hereby

ORDERED and ADJUDGED that the application is denied, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ORDERED and ADJUDGED that the application for summary judgment (Mot. Seq. 002) is denied in light of the dismissal of the petition. Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

January 6, 2020

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**