| **Eighteen Props., LLC v New York City Bd. of Standards & Appeals** |
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| 2020 NY Slip Op 30943(U) |
| March 31, 2020 |
| Supreme Court, New York County |
| Docket Number: 152821/2019 |
| 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** **IAS MOTION 5**
***Justice***

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**INDEX NO.** 152821/2019

EIGHTEEN PROPERTIES, LLC,
Petitioner,

**MOTION SEQ. NO.** 001

- v -

NEW YORK CITY BOARD OF STANDARDS AND APPEALS, NEW YORK CITY DEPARTMENT OF BUILDINGS, and THE CITY OF NEW YORK,
Respondents,

-and-

TANDA FRENCIS, DIEGO ANAYA, JEREMY PICKETT, MARCUS HUFFMAN, JONATHON p. CAMPO, CHRIS BROWN, PAMELA BROWN, SUSAN THOMAS, EMILY NUCCIARONE, DAVE MARIN, JAMES GLASER, ASHLEY STEIMER, PETER MALERBA, ALINA ALI, KIMBERLY MONGELLO, CORINNA DONLY, MATT SCOCH, SHANNON DURETTE, MAUREEN NEWMAN, ELIZABETH ZIMAN, LEA FULTON, JESSICA RANVILLE, and STEPHEN PAUL,
Joined Pursuant to CPLR 1001 as TENANTS of the Subject Premises, 255 18th Street, Brooklyn, New York

**DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 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, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110 were read on this motion to/for **ARTICLE 78**

Petitioner commenced this Article 78 proceeding seeking to annul, reverse, and vacate the determination of the New York City Board of Standards and Appeals ("BSA") to adopt a resolution, filed on February 15, 2019, revoking petitioner's certificate of occupancy ("CO") for the subject premises located at 255 18th Street, Brooklyn, New York. The CO was issued on September 12, 2013 in connection with the conversion of the premises from non-residential to residential use. On February 12, 2018, the New York City Department of Buildings ("DOB") sought to have BSA revoke the CO claiming that non-compliance existed at the time the CO was issued including an improper sprinkler system, lack

of residential units on the first floor, and non-permitted occupancy in the cellar.[1] [2] Petitioner asserts that the resolution should be reversed as it was arbitrary and capricious, affected by an error of law, an abuse of discretion, and unsupported by evidence as it failed to apply the accepted principal of "curable error"; made factual conclusions, without evidence; and denied petitioner due process in presenting evidentiary support for its position. Petitioner also sought a stay of the revocation of the CO during the pendency of this instant Article 78 proceeding. However, that relief was denied. (See *NYSEF Doc No. 27*).

Tenants Christopher Brown, Pamela Brown, Peter Malerba and Stephen Paul (collectively, "Tenants") oppose the petition. Specifically, tenants assert that the CO obtained on September 12, 2013 falsely stated that two residential apartments existed on the first floor when, in fact, no residential apartments have existed on the first floor since 2003. In support of this assertion, tenant Stephen Paul avows that he has occupied the first floor and the basement of the premises as a "first-class art studio operating under the Madarts' trade name" since the inception of his tenancy in 2003. (See *Tenant's Affirmation ¶10*, internal citation omitted). The tenants further assert that while petitioner filed the required alteration applications, it failed to complete the work detailed and many of the units remain non-compliant with applicable building, safety, and fire codes, i.e., insufficient sprinklers in the halls of the premises; a lack of mechanical venting in the bathrooms; illegal electrical wiring; exposed plumbing drains; unvented plumbing fixtures; and a failure to maintain smoke or carbon monoxide detectors in the building. The tenants aver that petitioner knowingly misrepresented the configuration of the first floor and basement when it sought and obtained the CO and that on or about October 12, 2018, respondents issued a partial vacate order for the first floor and basement based upon the discrepancy between the actual existing configuration and the CO. Tenants argue that the BSA's February 15, 2019 decision to revoke the CO was proper as it was based upon a finding that the building does not currently conform, neither previously conformed, to the plans upon which the CO was based.

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[1] The CO provided for a residence on the second, third and fourth floors, along with a "Use Group 16" storage in the cellar and part of the first floor, and residences on the balance of the first floor. (See ¶ 7, Verified Petition.)
[2] According to petitioner, BSA's resolution determined that the sprinkler system issue was curable and the first-floor residential unit issue was inexplicably indicated as being incapable of cure. Petitioner further contends that no specific finding was made as to the occupancy of the cellar. (See ¶ 9, Verified Petition.)

In support of its opposition, tenants also rely on the BSA record which indicated findings as to several unsafe conditions in the building; to wit: thirty-eight (38) open Environmental Control Board ("ECB") violations, twenty-one (21) open DOB violations, and $100,000.00 in outstanding penalties. The tenants note that, before arriving at its decision, the BSA considered letters from various residents supporting the application to revoke the CO which not only alleged that the CO was unlawfully obtained but outlined the existence of actual unsafe conditions in the premises. Tenants aver that they consistently lacked heat and/or gas service; that they were relegated to utilizing plug-in heaters which caused building-wide electrical shortages; that the building's front door was broken; the existence of leaking pipes, moldy and un-insulated concrete walls within the units, aged electrical wiring, and insufficient ventilation, among other unsafe living conditions. In short, tenants contend that the CO was unlawfully issued and further, that the BSA's determination was properly and rationally based upon the substantial information in the record and was thus, reasonable, not arbitrary, capricious or affected by error of law.

The New York City Board of Standards and Appeals, the New York City Department of Buildings, and The City of New York (collectively, "respondents") likewise oppose the petition arguing that as the CO was improperly issued, its revocation was warranted; that Multiple Dwelling Law § 277 is applicable and that petitioner is not in compliance with same; and, finally, that BSA's decision to revoke the CO was supported by the record.

In response to DOB's application to revoke petitioner's CO, a public hearing was held on October 11, 2018 and continued on November 20, 2018. On the October 11 hearing date, the issue of the applicability of New York State Multiple Dwelling Law (MDL) § 277(7)(b)(i)(E)[3] was raised. The hearing was adjourned and BSA asked the parties to brief the issue. On the November hearing date, BSA found that the actual conditions of the subject premises did not conform to the plans the CO was based upon at the time the CO was issued. BSA thus determined that the CO was invalid and warranted revocation. In making its determination, BSA found that MDL § 277 was applicable and that the

[3] This provision requires that there must be at least five feet between a dwelling's window and the property's rear lot line to provide requisite light and air for residents. Respondents acknowledge that the premises do not comply with this provision.

premises were not in compliance with same as the rear windows of the building were less than five feet from the property's rear lot line. BSA specifically determined that as the existing conditions could not be corrected absent significant construction, they were non-conforming requiring revocation of the CO.

Petitioner argues that MDL § 277 is inapplicable here. In opposition, respondents argue that MDL § 277 is applicable as the subject premises fit within the description of the type of premises for which the provision is intended, and further, that petitioner does not dispute that the subject building is not in compliance with this provision.

Respondents also dispute petitioner's contentions that BSA reached its conclusion regarding MDL § 277's applicability and its finding that the premises could not be brought into compliance absent significant construction without evidence. Respondents aver that BSA is comprised of experts in the field of architecture and construction and thus, its determination that the premises could not be brought into compliance without construction was based upon their collective expertise, as well as, supporting evidence in the record. Respondents contend that the determination was not arbitrary and further, maintains that BSA's decision to grant DOB's application to revoke the CO was rational, lawful, and supported by the record as whole.

In an Article 78 proceeding, the scope of judicial review is limited to whether an administrative 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. (CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991].) Generally, judicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether that determination is supported by substantial evidence. (CPLR § 7803[4]; *Matter of Pell*, at 230.)

Here, the subject premises is a four-story, plus cellar building originally erected for manufacturing and commercial use. However, it currently exists as a walk-up apartment building with twenty-seven (27) residential units. The CO, which went into effect on September 18, 2013, states that there are two dwelling units on the first floor. However, no such dwelling units existed at the time the

CO was sought and issued. Two alteration applications, which post-dated the CO, indicated that specific changes were to be made. To date, many of the alterations remain outstanding. In reaching its decision, the BSA cited an active stop work order, the existence of thirty-eight (38) open ECB violations, twenty-one (21) open DOB violations and $100,000.00 in outstanding penalties. BSA determined that the premises lacked the required sprinkler system and that no dwellings existed on the first floor despite its CO attesting same. Moreover, BSA found that as the rear windows are less than five feet from the rear lot line, the premises are in violation of MDL § 277(7)(b)(i)(E). Finally, the BSA indicated that while the lack of a proper sprinkler system was insufficient to revoke the CO, the fact that the "as-built conditions of the building at the subject premises do not presently conform to the plans which the issuance of the CO was based, nor did they comply at the time the CO was issued.... the CO was unlawfully issued and must be revoked."

With respect to petitioner's argument regarding the applicability of MDL § 277, which was briefed and presented to BSA after which BSA determined that MDL § 277 was applicable, this court finds that BSA's determination was not affected by an error of law. MDL § 277 states, in pertinent part:

> Any building in any city of more than one million persons which at any time prior to January first, nineteen hundred seventy-seven was occupied for loft, commercial, institutional, public, community facility or manufacturing purposes, may, notwithstanding any other article of this chapter, or any provision of law covering the same subject matter (except as otherwise required by the local zoning law or resolution), be occupied in whole or in part for joint living-work quarters for artists or general residential purposes if such occupancy is in compliance with this article. Such occupancy shall be permitted only if the following conditions are met and complied with....

Undoubtedly as this building was erected in 1905, in New York City, for commercial and manufacturing use and is now being used for residential purposes, as pleaded in the verified petition, MDL § 277 is applicable and residential occupancy shall only be permitted upon compliance with the conditions set forth therein. Furthermore, as correctly cited by respondents, pursuant to the New York City Charter § 645(b)(3)(d) "a certificate of occupancy of a building or structure shall certify that such building or structure conforms to the requirements of all laws, rules, regulations and orders applicable to it and shall be in such form as the commissioner shall direct." Moreover, despite petitioner's belated assertion, via reply, that MDL § 301(5) provides an affirmative defense to the revocation of the certificate of

occupancy, this defense was not raised before the BSA, nor was it raised in the petition. It is well-settled in the First Department that the function of a reply is to address arguments raised in opposition to the position taken by the movant, not to permit the movant to advance new arguments in support of the motion. (See *Lazar v Nico Indus., Inc.*, 128 AD2d 408, 409-410 [1st Dept 1987]; CPLR 2214[c].)

Here, BSA properly determined that the CO was issued "unlawfully" as the conditions of the premises are not in conformity with the CO, nor in conformity with two subsequent alteration applications. BSA's decision was based upon substantial evidence in the record including several open fire, building, and code violations and conditions which require significant construction to cure. Based upon the foregoing, the court finds that the BSA's determination to revoke petitioner's certificate of occupancy was not in violation of lawful procedures, arbitrary or capricious, or affected by an error of law. In fact, the decision was rational and supported by law. As such, it is hereby

ORDERED and ADJUDGED that the court denies petitioner's Article 78 Petition seeking to annul, reverse, and vacate the determination of the New York City Board of Standards and Appeals to adopt a resolution, filed on February 15, 2019, revoking petitioner's certificate of occupancy for the subject premises located at 255 18th Street, Brooklyn, New York; and it is further

ORDERED and ADJUDGED that the proceeding is dismissed, without costs and any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

**March 31, 2020**

**HON. VERNA L. SAUNDERS, JSC**

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| CHECK ONE: | [X] | CASE DISPOSED | | [ ] | NON-FINAL DISPOSITION | | |
| | [ ] | GRANTED | [X] DENIED | [ ] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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