

**Barbiere v Board of Mgrs. of 175 W. 12th St.
Condominium**

2020 NY Slip Op 33768(U)

November 12, 2020

Supreme Court, New York County

Docket Number: 158654/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

JANET A. BARBIERE, ELLIOTT M. KROLL

Petitioners,

- v -

THE BOARD OF MANAGERS OF 175 WEST 12TH
STREET CONDOMINIUM, 175 WEST 12TH STREET
CONDOMINIUM,

Respondents.

-----X

INDEX NO. 158654/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER,
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 35, 37, 38, 39, 40, 41, 42, 43,

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The petition for an order directing respondents to cease and desist from “singling out Petitioners” for harmful treatment by implementing certain plans relating to Local Law 11 work on the south and west exposures of petitioners’ apartment is denied and this proceeding is dismissed. The petition is also denied to the extent it seeks an order for specific performance for the same relief.

Background

In this proceeding, petitioners (condo owners) complain that respondents have been performing ongoing Local Law 11 work for over a year on the building’s façade. They assert that their apartment was the only one with a western or southern exposure that would not be receiving the same remediation as other similarly situated units. The genesis of this Article 78 proceeding is that decision—not to remediate in the way petitioners desire.

Specifically, petitioners claim that rather than comply with the plans that respondent entered into which require replacing shelf-angles, fixing cinder block, installing vapor barriers and re-doing the walls of petitioners' apartment, respondents are only going to put pins in the wall where there is crumbling or non-existent cinder block. They claim that this decision clearly violates the by-laws by singling out petitioners. Petitioners speculate that the work can be done the way they want but that petitioners have unique windows and respondents did not budget for the additional cost of this work.

In opposition, respondents acknowledge that they made the initial decision to do the Local Law 11 work but the instant petition improperly seeks to have the Court dictate the method of completing the construction. Respondents also stress that they have not made any final decisions about the work on petitioners' apartment. They claim that the instant petition should be dismissed as premature.

Moreover, respondents claim that determinations about how to conduct building repairs falls within the business judgment rule. They point out that petitioners are unhappy because they were allegedly "singled out" but at the same time acknowledge that their apartment requires a different scope of work due to their unique window installation. Respondents assert that they devised alternate construction plans involving a pinning method for the façade near petitioners' apartment. Respondents also claim that this proceeding is duplicative of a separate action pending in this Court.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d

587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

As an initial matter, the Court did not consider the reply filed by petitioners. The order to show cause did not provide for a reply and, rather than requesting leave to file such papers, petitioners simply uploaded a reply without permission. Petitioners only asked for permission *after* respondents rejected these papers. And, bizarrely, the reply also seeks additional affirmative relief not contained in the petition (to strike an affidavit attached to respondents’ answer). Obviously, that is also improper.

The Court must first consider whether this proceeding is ripe for review under an Article 78. That requires a determination about whether respondents have made a final determination about the work to be done on petitioners’ apartment. “An administrative determination becomes “final and binding” when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party” (*Walton v New York State Dept. of Correctional Services*, 8 NY3d 186, 194, 831 NYS2d 749 [2007] [internal quotations and citation omitted]).

As applied to respondents’ actions, the Court finds that there has not been a final determination made. Respondents’ project manager for the Local Law 11 work at the building

explains that this project has been ongoing since 2017 (NYSCEF Doc. No. 41, ¶ 15). Mr. Joseph's affidavit makes clear that the project is not completed and no final decision has been reached regarding what method is to be used on petitioners' façade (*id.* ¶¶ 10, 11). He also emphasizes that the pinning method—the work that petitioners complain about—is common in the industry (*id.* ¶ 10).

Nothing in petitioners' moving papers contradict respondents' assertion that there has not been a final determination regarding what method of façade repair will be used in connection with their apartment. The Court recognizes that while it may be frustrating that petitioners are unable to control the exact method that will be used, unfortunately, an Article 78 is not the proper method to dictate a potential future construction decision by a board.

This Court has no interest in becoming a general contractor and telling respondents how to complete Local Law 11 work that remains ongoing. That is not the Court's role. Part of living in a condo means having to work with the condo and the recognition that not every owner is going to agree with the decisions made by the board. Petitioners clearly feel that they are being singled out, but the evidence in this proceeding provides a readily apparent reason for that—their unique windows.

The verified petition also makes clear that there has been no final determination. Petitioners quote an email from respondents' counsel stating that “the recommended solution at the 18th floor is to install helical pins throughout to support the masonry, just as it is doing with the north and east facades of the building” (NYSCEF Doc. No. 1, ¶ 70 [recounting an email from respondents' attorney to petitioners]). Petitioners also allege that “Respondents is not going to remediate the Walls of Petitioners' Apartment. All they are going to do is put ‘pins’ in the wall”

(*id.* ¶ 74). There is no question that alleging what respondents might do in the future does not constitute a final determination for purposes of an Article 78.

The Court also finds that even if a final determination could be found in this proceeding, the fact is that respondents' decision is protected by the business judgment rule (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153, 760 NYS2d 745 [2003]). Nothing in this record suggests that the Court should substitute its own judgment for that of respondents.

To the extent the petition seeks a preliminary injunction, the Court also denies that portion of the petition. There is no basis to issue an order of specific performance requiring respondents to do work in accordance with petitioners' wishes. Respondents are entitled to complete the Local Law 11 work as they see fit, especially here, where petitioners offer nothing more than disagreement with respondents' action. In other words, there is no evidence from an expert suggesting that the type of work petitioners complain about is unsafe or ineffective.

Summary

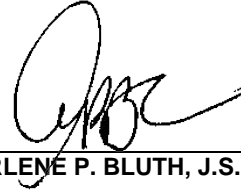
The Court observes that the verified petition is not styled as a hybrid verified petition/complaint. Therefore, because the Court denies the petition, it must also dismiss this proceeding. The Court recognizes that petitioners attempted to change the caption in their rejected reply to refer to themselves as "petitioners-plaintiffs" (they also did it in the verification to the petition) but there is no basis to find that this is anything other than a special proceeding. The relief requested seeks to overturn a purported decision made by respondents.

Accordingly, it is hereby

ADJUDGED that the petition is denied, this proceeding is dismissed and the Clerk is directed to enter judgment in favor of respondents and against petitioners after presentation of proper papers therefor.

11/12/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE