133 Guy Brewer Blvd Corp. v New York City Off. of Admin. Trials & Hearings
2022 NY Slip Op 31022(U)
March 29, 2022
Supreme Court, New York County
Docket Number: Index No. 159761/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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133 GUY BREWER BLVD CORP.,

Petitioner,

- v -

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK

Respondent.

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INDEX NO. 159761/2021

MOTION DATE 03/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief pursuant to CPLR Article 78 of petitioner 133 Guy Brewer Blvd Corp. (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Office of Administrative Trials and Hearings shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner 133 Guy Brewer Blvd Corp. (landlord) seeks a judgment to overturn a decision of the respondent New York City Office of Administrative Trials and Hearings (OATH) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a two-story, mixed-use building with a commercial space on the first floor and a one-family dwelling on the second floor which is located at 133-18 Guy R. Brewer Blvd. in the County of Queens, City and State of New York (the building). *See* verified petition, ¶ 5. On January 10, 2020, inspectors from the co-respondent Department of Buildings of the City of New York (DOB) and the non-party New York City Fire Department (FDNY) visited the building and observed that its second floor had been subdivided into six dwelling units. *Id*., ¶ 11. The DOB thereupon issued landlord five summonses, bearing Summons Numbers 35446392M, 35446393Y, 35446394X, 35446396J, and 35446395H, each of which alleged a class 1 violation of NYC Admin. Code § 28-210.1 ("illegal conversion") and sought the imposition of fines pursuant to NYC Admin. Code § 28-202.1 ("civil penalties"). *Id*., ¶¶ 11-12; exhibit C.

An OATH hearing officer conducted a remote hearing on the summonses on December 22, 2020 and issued a decision, dated December 30, 2020, that sustained all of them, imposed civil penalties of $15,000.00 for each of them, and also imposed a total of $22,000.00 in "per day" civil penalties calculated at a rate of $1,000.00 per day for the 22 days that passed between DOB's issuance of the summonses and its acceptance of a certificate of correction from landlord (the HO's decision). *See* verified petition, ¶¶ 13-16; exhibit D. Landlord thereafter requested an administrative appeal of the HO's decision, and OATH's Appeals Unit considered landlord's

submissions without a hearing[1] and issued a decision, dated April 22, 2021, that upheld the HO's decision but reversed the portion of it which imposed the "per day" civil penalties (the AU's decision). *Id.*, ¶ 17-19; exhibit A. The relevant portion of the AU's decision found as follows:

> "For the following reasons, the [OATH] Board affirms the hearing officer's decisions but modifies the amount of per day penalties imposed.
>
> "On this record, the Board finds that the bedrooms converted into five SROs were 'dwelling units.' At the hearing, Respondent's representative did not dispute Petitioner's evidence that the legal occupancy of the second floor was a single dwelling unit and that six bedrooms in that apartment had been converted into SROs. Contrary to Respondent's attorney's assertion on appeal, a habitable room occupied or arranged to be occupied as a unit separate from all other units within a dwelling is a 'dwelling unit' per BC [i.e., Building Code] § 310.2. The ZR [i.e., Zoning Resolution] definition of 'dwelling unit' does not control, as Respondent was not charged with a violation of the ZR. Consequently, Petitioner established that the apartment was converted to five dwelling units above the legally authorized number, permitting issuance of five separate Class 1 violations of Code § 28-210.1 per Code §§ 28-202.1 and 28-201.2.1.
>
> "The Board finds further that Respondent failed to show that it was exempt from civil penalties per paragraph 9.2 of Code § 28-202.1. At the hearing, Respondent's representative asserted that the premises, as a single-family dwelling, was exempt from HPD registration. However, per Code § 27-2097, an owner of a single-family must register the property with HPD where neither the owner nor any family member occupies the dwelling. Here, the second-floor dwelling was occupied by a tenant. Therefore, Respondent did not meet the criterion for exemption set forth in subparagraph 9.2.2 of Code § 28-202.1. Further, Respondent failed to establish that it could not reasonably have known of the illegal conversion, the criterion set forth in subparagraph 9.2.3 of Code § 28-202.1. Respondent's manager testified that he was unaware the tenant had converted the apartment to SROs. However, he testified that he had never visited the property before the date of violation and did not have anyone maintaining the property, other than a handyman to make repairs upon request by the tenant. The Board finds that Respondent could have known of the illegal conversion had it reasonably monitored the property. *Cf. DOB v Renee Michelle Banks*, Appeal No. 1900967 (August 8, 2019) (the respondent's reliance on a friend to make weekly inspections and her own personal inspections were sufficient to show that she could not reasonably have known of the illegal conversion). Consequently, the Board concludes that Respondent was not exempt from civil penalties per paragraph 9.2 of Code § 28-202.1. The Board notes that the base penalties for multiple violations of Code § 28-210.1 issued per Code § 28-202.1 are statutorily authorized. The Board is not the proper forum for any constitutional claim that the penalty amount is excessive.
>
> "However, the Board finds that the evidence in the record was sufficient to show correction on the date of violation, warranting zero per day penalties. In Respondent's officer's notarized letter, he states that "the building was vacated on January 10, 2020.

[1] DOB did not participate in the administrative appeal. *See* verified petition, ¶ 18.

> All 5 SRO's [i.e., single room occupancy units] at the premises have been removed. All locking devices have been fully removed from doors of the rooms on the second floor.' The hearing officer did not credit Respondent's officer's notarized letter because it was not an affidavit. However, on the date of violation, a partial vacate order was issued for the second floor. The IO [i.e., DOB inspection officer] testified that he told the three occupants he encountered in the apartment that they had to leave and offered them Red Cross services, which they accepted. Respondent's manager testified that he personally went to the premises on the date of inspection and made sure the all the occupants of the second-floor apartment left. The DOB complaint record shows that on January 15, 2020, the inspector who went to the premises to verify compliance with the vacate order was unable to access the second floor, which Respondent's representative asserted was because the apartment was vacant. The DOB complaint record shows further that on May 4, 2020, the second-floor apartment was unoccupied. Based on the totality of evidence in the record, the Board finds that the second-floor apartment was vacated on the date of violation, and therefore the SRO occupancy ceased on that date. As the summons was affixed to the premises on the date of violation and per day penalties commence on the day following the first aspect of service, per day penalties are not applicable here. Accordingly, the Board affirms the hearing officer's decisions sustaining five Class 1 violations of Code § 28-210.1 and imposing $15,000 for each violation, for a total penalty amount of $75,000, but modifies the per day penalties imposed under Code § 28-202.1 to zero."

Id., exhibit A.

Landlord commenced this Article 78 proceeding to challenge the AU's decision on October 27, 2021. *See* notice of petition, RJI. Respondents sought and received several adjournments and eventually filed an answer on February 22, 2022. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency 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 (1st Dept 1996). A determination will only be found 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. Here, landlord raises two arguments that the AU's decision was an arbitrary and capricious ruling, while respondents' second affirmative defense asserts that the AU's decision had a rational basis in the administrative record and should not be disturbed. *See* verified petition, ¶¶ 21-47; verified answer, ¶¶ 110-122. After carefully considering all of the arguments, the court finds for respondents.

Landlord first argues that the AU was incorrect to uphold the portion of the HO's decision that "found that 'the dwellings are SROs as defined in the Multiple Dwelling Law [MDL] § 4 (6).'" *See* verified petition, ¶ 23. Landlord specifically asserts that: 1) the MDL does not apply because the building is not a "multiple dwelling" within that statute's definition; 2) the six subdivided units on the building's second floor were not "dwelling units" as defined in the Zoning Resolution either; and 3) as a result, the DOB should only have issued one summons for the violation of NYC Admin. Code § 28-210.1, since there is only one "dwelling unit" on the building's second floor. *Id.*, ¶¶ 21-34. The court notes that landlord does not cite any caselaw to support its argument. The court also notes that both the HO and the AU considered and rejected landlord's reliance on the MDL, and concluded that the Building Code's definition of "dwelling unit" controlled with respect to the instant summonses. *Id.*, exhibits A, D. Respondents repeat this conclusion in their answer, and further argue that their interpretations of the regulations they administer are entitled to judicial deference. *See* verified answer, ¶¶ 110-122; respondents' mem

of law at 13-14, 15-16, 20-21. Respondents are correct. It is well settled that "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). It is unquestionable that the DOB and OATH are charged with administering the New York City Building Code, which includes NYC Admin. Code § 28-210.1 ("Illegal residential conversions"). As a result, the court is required to defer to their interpretation of that provision if it is "not unreasonable or irrational." Here, as observed, landlord offers no support for its contention that OATH should have accepted its MDL argument instead of the DOB's interpretation of the Building Code. Without any rationale for its challenge to OATH's determination, landlord has failed to demonstrate that that determination was "unreasonable." As a result, the court rejects landlord's first argument and concludes that OATH had a rational basis for its decision to uphold the DOB's interpretation of the Building Code.

Landlord next argues that "[t]o allow $75,000.00 in fines and penalties for a single dwelling unit is unconscionable and shocking to one's conscience and fairness, and should be annulled and/or modified." *See* verified petition, ¶ 35. Respondents reply that "the imposed civil penalties are not excessive or grossly disproportionate." *See* respondents' mem of law at 18-20. After careful review, the court finds for respondents. Firstly, there is a legal justification for the challenged fines, since NYC Admin. Code § 28-202.1 (1) plainly authorizes civil penalties "of not less than one thousand dollars nor more than $25,000 . . . for each violation" of the Building Code that is classified as "immediately hazardous" (as are violations of NYC Admin. Code § 28-210.1). Secondly, the Appellate Division, First Department, routinely upholds decisions that sustained similar agency-assessed civil penalties against arguments that

they were excessive. *See e.g.*, *Matter of Ding Sheng Realty Corp. v City of New York*, 179 AD3d 514 (1st Dept 2020); *Matter of Pamela Equities Corp. v Environmental Control Bd. of the City of N.Y.*, 171 AD3d 623 (1st Dept 2019); *Matter of 42/9 Residential LLC v New York City Envtl. Control Bd.*, 165 AD3d 541 (1st Dept 2018); *see also Matter of Konstas v Environmental Control Bd. of City of N.Y.*, 104 AD3d 689 (2d Dept 2013); *1058 Bronx LLC v NYC Office of Administrative Trials and Hearings*, 2021 WL 4553687 (Sup Ct, NY County 2021). Here, landlord's statement that "[t]he fine imposed is shocking to a sense of fairness and highly disproportionate to the violations for a single apartment where the Petitioner immediately corrected the condition" is disingenuous. *See* verified petition, ¶ 42. There were five violations, not one. The fact that landlord "immediately corrected" those violations by directing the SRO tenants to vacate was addressed by OATH's decision not to allow "per day" violation penalties. Landlord's attempt to downplay the seriousness of the five instant violations is belied by the fact that they are classified as "immediately hazardous" by NYC Admin. Code § 28-210.1. Therefore, the court rejects landlord's contentions and finds that its second argument is unsupported.

Accordingly, having concludes that the determinations in the AU's decision were rationally based and not arbitrary and capricious, the court also concludes that landlord has failed to demonstrate that its Article 78 petition is meritorious, and finds that that petition should be denied.

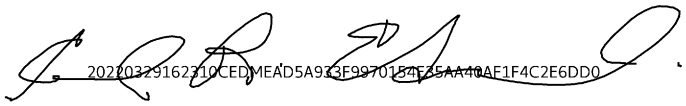
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief pursuant to CPLR Article 78 of petitioner 133 Guy Brewer Blvd Corp. (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Office of Administrative Trials and Hearings shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



3/29/2022
DATE

CAROL EDMEAD, J.S.C.

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