

Cruz v New York City Off. of Admin. Trials & Hearings

2023 NY Slip Op 30252(U)

January 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 515808/2021

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of JANUARY, 2023

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

-----X
ROSA CRUZ,

Plaintiff,
-against-

Index No.: 515808/2021
Decision and Order
Mot. Seq. No. 1

THE NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND
HEARINGS ET AL,

Defendants,
-----X

The following papers NYSCEF Doc #'s 1 to 35 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	1-13
Opposing Affidavits (Affirmations) _____	17-34
Reply Affidavit(s) _____	35

After having come before the Court and the Court having heard Oral Argument on June 15, 2022 the court finds as follows:

Petitioner moves pursuant to CPLR §§ 7803(4) for an order (1) annulling, vacating, and voiding the decision dated 3/17/2021; (2) Reinstating the decision dated 10/5/2020; (3) Directing that (the) penalty(ies) be mitigated in all summons, including but not limited to Summons number 35376592X; (4) Directing that the Respondent return all monies, fees, or sums paid to the Petitioner with respect to Summons number 35376592X; (5) Staying all proceedings and enforcement in relation to Summons number 35376592X. Respondent opposes the same.

FACTS

On 5/24/2019, the Respondent DOB issued summons #35376592X to the Petitioner after allegedly inspecting the interior of the Premises. See NYSCEF DOC 6. The summons alleged that the Petitioner violated sections 28-210.1 and 28-202.1 of the New York City Administrative Code, which constitutes a Class 1 violation with the accrual of daily penalties. The summons states as follows:

“Residence converted maintained or occupied as a dwelling for more than the legally approved number of families. [L]egal two family dwelling converted to a four-family dwelling. Dept of Building records [indicate] residence as a 2 family. Residence now altered and occupied as a 4 family. Alteration work noted: At cellar level converted to class A apt with full kitchen, 3 pc bathroom, 1 room. Also converted the [a]ttic to a class A apt with full kitchen, 3 pc bathroom and 2 rooms. VACATE Attic and Cellar. Remedy: Comply with code.”

The Respondent appeared at a telephonic hearing on 10/5/2020 for violation #35376592X. Inspector Ramkisoorn appeared at that hearing to present the Petitioner’s prima facie case. James Schmitz, Counsel for the DOB, maintained that the Premises were a two-family home. See NYSCEF Doc. No. 4.

Judge Cardoso conducted the hearing. She marked it fully held and reserved decision. Thereafter, Judge Cardoso issued a decision dated 10/5/2020 in which she dismissed the violation. The hearing officer maintained that the Petitioner failed to meet its prima facie burden because the inspector failed to evince that class “A” apartments existed in both the cellar and the attic. Inspector Ramkisoorn presented alleged pictures of the cellar and attic. See NYSCEF Doc. No. 7—*Inspector’s Photos*. The inspector could not recall the locations of several pictures upon questioning. See NYSCEF Doc. No. 5—*Hearing Transcript* at pp. 21 at 4–7, 19; pp. 23 at 21–25; pp. 24 at 4–6. **The inspector failed to present sufficient evidence**

that full, three-piece bathrooms existed in both the attic and cellar, and his pictures from the date of inspection could not confirm such. See NYSCEF Doc. No. 5— *Hearing Transcript at pp. 24 at 18–25*. Moreover, the inspector testified that he failed to inspect whether the attic or cellar had active or capped gas lines. See NYSCEF Doc. No. 5— *Hearing Transcript at pp. 24 at 20–25*.

The DOB mailed a Notice of Appeal to Ms. Cruz. Thereafter, the DOB filed an appeal on 12/28/2020. Ms. Cruz maintains that she did not receive a copy of the appeal See NYSCEF Doc. No. 8—*DOB Appeal*. The OATH Hearings Division Appeals Unit issued a decision on 3/17/2021 overturning the hearing officer's decision and imposing a penalty of \$50,000 on Ms. Cruz. See NYSCEF Doc. No. 3— *Oath Appellate Board Decision*.

Despite Judge Cardoso's findings of facts, the Appellate Board's decision stated that, "[w]hile Respondent's attorney asserted that the IO's photographs did not show two showers, it was not necessary for Petitioner to offer photographic evidence to prove its case." See NYSCEF Doc. No. 3— *Oath Appellate Board Decision*. The Appellate Board added that, "[further], the Board finds that the IO's photographs depict two Class "A" apartments consistent with the IO's affirmed statements on the summons." *Id at 3*. The Board added that, "[t]he burden then shifted to Respondent to refute Petitioner's case or otherwise establish a defense" though the hearing officer failed to correctly identify some of the pictures. *Id*.

ANALYSIS

Pursuant to Article 78 of the CPLR "The only questions that may be raised in a proceeding under this article are... whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious

or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; ...". NY CPLR 7803 (McKinney). The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321: **"Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."** *Id.* at 231, 356 NYS2d at 839, 313 NE2d at 325. The question, said the Court, is whether the determination has a "rational basis." *Id.*

The burden of proof pursuant to 48 RCNY §§6-12(a) is preponderance of the evidence. See Verified Petition at § 9. It stated that, "the preponderance of the evidence standard requires enough evidence to 'produce a reasonable belief in the truth of the facts asserted.'" *Addimando*, 197 AD 3d at 106. The Second Department goes on to hold that, "[a] party who has the burden of proof by a preponderance of the evidence must prove his or her contention by the greater weight of the evidence." *Id.*; see *Jarret v. Madifari*, 67 AD 2d 396, 404 (1st Dept 1979).

In the present case the ruling of the OATH Appellate Board was arbitrary and capricious and abuse of discretion as to the measure or mode of penalty or discipline imposed. In the present case, the inspector maintained that the alleged class "A" dwelling units both consisted of full bathrooms with toilets, sinks, and bathing fixtures such as showers; cooking spaces; and living spaces. See NYSCEF Doc. No. 6— *DOB/ECB Violation*. The alleged proof which the DOB adduced during the hearing was speculation, assumption, and presumption. The presented exhibits and the inspector's testimony failed to establish that the alleged condition constituted a class 1 violation pursuant to the NYC Administrative Code. The inspector failed to

identify the necessary fixtures for a class “A” apartment at the 10/5/2020 hearing despite describing a “full kitchen, 3pc bathroom, 1 room” at the cellar level and a “full kitchen, 3 pc bathroom, and 2 rooms” at the attic level. The inspector failed to identify the location of one of the alleged living spaces depicted in the presented photos. See NYSCEF Doc. No. 5— *Hearing Transcript* at pp. 21 at 4–7; pp. 23 at 23–25. He could not recall the location of a shower. See NYSCEF Doc. No. 5— *Hearing transcript* pp. 24 at 4–6. The inspector did not determine whether the bathrooms in the attic or the cellar had functioning water lines or bathing fixtures upon inspecting the home, contradicting the summons. See NYSCEF Doc. No. 5— *Hearing Transcript* pp. 24 at 18–25; pp. 25 at 20–25. Moreover, the inspector did not establish that the alleged condition was hazardous to the public. The proof lacked sufficiency to exhibit that Ms. Cruz converted and/or maintained the Premises in the manner alleged. The alleged condition failed to present any threat that severely affected life, health, safety, property, public interest, or a significant number of people. The alleged condition did not warrant immediate correction. The DOB failed to establish that conversion and/or maintenance of a four family dwelling occurred by definition pursuant to RCNY § 28-210.1. As a result, the DOB failed to make its prima facie case of a Class 1 violation as the inspector’s own testimony contradicted the violation. See NYSCEF Doc. No. 4— *10/5/2020 Oath Decision; HPD printout; I-card; Vacate Order, and PPO printout*. Moreover, the Petitioner verifies that the picture of the brown bed on the bottom left corner of the first page of NYSCEF Doc No. 7— *Inspector Photo’s* is actually on the second floor. No living quarters have ever existed in the attic level while the Petitioner has owned the Premises, and the DOB has failed to present evidence of such. Due to the telephonic nature of the

hearing and the Petitioner's lack of timely electronic access to the pictures, she was not able to view the photos to oppose the inspector's statements at the time of the hearing. Moreover, Ms. Cruz had no duty to rebut the violation because the Department of Buildings failed to meet its prima facie standard of proof. Judge Cardoso found that the DOB made an insufficient showing of a violation at the underlying hearing through inspector's testimony. The Appellate Board issued a decision on 3/17/2021 that was contrary to the facts because the issuing officer failed to identify the location of several living quarters, and one referenced picture was of the second floor. Moreover, the issuing officer failed to identify if the bathrooms were full, three-piece bathrooms. This decision has a basis in prejudice and speculation, not testimony or facts.

Accordingly, the decision dated 3/17/2021 is void and the decision dated 10/5/2020 is hereby reinstated. It is further ordered that (the) penalty(ies) be mitigated in all summons, including but not limited to Summons number 35376592X; it is further ordered that the Respondent return all monies, fees, or sums paid to the Petitioner with respect to Summons number 35376592X; it is further ordered all proceedings and enforcement in relation to Summons number 35376592X are stayed.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
January 25, 2023

ENTER FORTHWITH:

JAN 25 2023

Hon. Richard Velasquez, JSC

HON. RICHARD VELASQUEZ