

**Illyrian Props. Inc. v Department of Hous. Preserv. & Dev.**

2023 NY Slip Op 34389(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 153153/2023

Judge: J. Machelles Sweeting

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This opinion is uncorrected and not selected for official publication.



### Background

According to Petitioner, the tenants in Unit 2A (the “subject unit”) of the property “refused to pay rent, then they damaged their apartments and contacted the agency to complain about the living conditions.” On August 19, 2019, New York City Department of Health and Mental Hygiene (“DOHMH”) issued a Commissioner’s Order (“the repair order”) that directed petitioner to correct certain conditions in the subject unit within 21 days. DOHMH subsequently found that petitioner failed to correct the cited conditions, and DOHMH requested the New York City Department of Housing Preservation and Development (“HPD”) execute the repair order. HPD then awarded the job to contractor Creative Touch Construction Corp. (“the Contractor”), and HPD found on February 16, 2021 that the Contractor had completed the work. HPD paid the Contractor \$15,728.63 and assessed this charge against the subject property. By correspondence dated April 7, 2022, petitioner submitted a written protest of the subject charge that included what petitioner claimed was a letter from the tenant in the subject unit. In a Final Determination, dated January 10, 2023, HPD denied petitioner’s protest and upheld the subject charge.

Petitioner also claims that on February 19, 2022, an HPD inspector opened a water sprinkler valve at the property and left it open, which released a flood of water and caused extensive damage to the basement. Petitioner alleges that the total damages were in the amount of \$136,657.50, but petitioner’s insurance company only paid \$83,994.78, so petitioner now seeks to recover the remaining balance of \$52,662.72 from the City.

Arguments Made by the Parties

With respect to the \$15,728.63 Contactor's fee, petitioner argues that it should not have to pay this "for the simple reason that no work was actually performed in the subject apartment" and that HPD was, in effect, wrong to pay a contractor when said contractor had not done any of the actual work under the repair order. Petitioner claims that it informed HPD of this in its protest letter, and that HPD's denial of petitioner's protest was arbitrary and capricious. In support of these arguments, petitioner submits, *inter alia*, copies of HPD's Final Determination (NYSCEF Doc. Nos. 3, 13, 21) and petitioner's protest letter (NYSCEF Doc. Nos. 4, 14, 22). As noted, petitioner's protest letter included what petitioner claimed was a letter from the tenant in the subject unit. The tenant's letter stated, in part, "I Ogbuago Thompson testifies that the work the contractor claim that he has done for the NYC Department of Housing Preservation & Development in my apartment is false."

In opposition, the City argues that the instant proceeding should be dismissed as petitioner failed to timely serve the City pursuant to Civil Practice Law and Rules ("CPLR") 306-b, which provides that service of a petition with notice of petition must be complete no later than fifteen days after the applicable statute of limitations ("SOL") expires. In this matter, the SOL expired on May 10, 2023 so petitioner should have served the City by May 25, 2023. Instead, service was not effectuated until two months later, on July 18, 2023.

The City also argues that HPD had reviewed petitioner's protest and found, contrary to petitioner's assertions, that there was ample evidence to show that the Contractor had indeed completed the work under the repair order. The City argues that HPD's Final Determination was "reasonable, rational and in all respects conformed with the applicable statutes, laws and regulations, and should be upheld." In support of these arguments, the City submitted, *inter alia*,

pictures of the subject apartment taken by the HPD inspector on January 8 2021 (NYSCEF Doc. No. 39); a copy of the HPD inspector's February 8, 2021 note and pictures (NYSCEF Doc. No. 41); a copy of the HPD inspector's February 9, 2021 note and pictures (NYSCEF Doc. No. 42); a copy of the HPD inspector's February 16, 2021 note and pictures (NYSCEF Doc. No. 43); and the Contractor's invoice, affidavit and pictures (NYSCEF Doc. No. 44).

With respect to the water damage to the basement, as noted above, petitioner claims that an HPD inspector caused this damage on February 19, 2022. In opposition, the City argues, first, that HPD has no record of any inspector inspecting the subject property on February 19, 2022. The City argues, second, that petitioner's claim is a tort claim and not appropriately brought in an Article 78 proceeding. The City argues, third, that if petitioner's filings alleged a tort, then petitioner was required to file a Notice of Claim within ninety days of the cause of action accruing, which petitioner did not.

### Conclusions of Law

"In an article 78 proceeding, an administrative action can be set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion. An action is arbitrary if it is without sound basis in reason and is generally taken without regard to the facts [...] deference is normally given to an administrative agency's determination" [internal citations omitted] (Metro. Movers Ass'n, Inc. v Liu, 95 AD3d 596 [1st Dept 2012]).

Here, the Final Determination issued by HPD includes the following:

After bids were solicited by HPD, the lowest responsive bidder, Creative Touch Construction Corp ("Creative Touch"), was selected to perform the job by HPD. HPD's contractor, Creative Touch, began work for OMO # EL12520 on or about February 8, 2021. On February 8, 2021, an HPD inspector observed work in progress by Creative Touch and observed that work for OMO # EL12520 was approximately 30% complete. On February 9, 2021, an HPD inspector observed work in

progress by Creative Touch and observed that work for OMO # EL12520 was approximately 70% complete. Such inspector observed that Creative Touch had performed work that included having installed new closet doors by both bedrooms, and a new sink, and had started installing a trash hold at the bedroom entrance. Creative Touch provided HPD with an invoice and sworn affidavit stating that it completed work for OMO # EL12520 on February 11, 2021. An HPD inspector verified at an inspection on February 16, 2021 that work was completed for OMO # EL12520. Creative Touch additionally provided HPD with pictures of its employee performing the repairs for OMO#EL12520 and before and after pictures of the completed work.

[...]

HPD records and information provided to HPD contradict the allegations in your protest that the work that resulted in the subject charge was not performed by the HPD hired contractor for OMO # EL12520, and indicate that the purported tenant affidavit is a document that is lacking accurate statements and appears to be lacking truthful attribution:

1. Contrary to your suggestion that work was not performed at the subject apartment by HPD's contractor Creative Touch, Creative Touch provided to HPD an invoice, sworn affidavit, pictures of its employee performing the repairs and before and after pictures of the completed work, all of which consistently indicate that it performed work for OMO # EL12520 in the subject apartment.
2. HPD inspectors additionally observed work being performed by Creative Touch on February 8, 2021 and February 9, 2021 and observed work completed for OMO # EL12520 on February 16, 2021, all of which are consistent with the statements and documentation provided to HPD by Creative Touch.
3. HPD has been provided information that indicates that the purported tenant affidavit you have provided, purportedly signed by the tenant of the subject apartment, has been misrepresented by you in your protest. The purported tenant affidavit, which was purportedly signed by the tenant on the same date of April 7, 2022 that Madrit Kurtishi's affidavit was signed, and was purportedly witnessed by the same notary who purportedly witnessed Mr. Kurtishi's signature, with a commission in the state of New Jersey (not New York), notably appears to misspell the tenants actual name and appears to also falsely attribute to the tenant of the subject apartment the statement that work done by HPD's contractor "is false." It appears from information provided to HPD that the tenants first name was misspelled in multiple places in the purported affidavit, that "Ogbuago" is not the correct spelling of the first name of a tenant of the subject apartment, and that the representations made in the purported tenant affidavit were falsely represented to HPD and falsely attributed to the tenant. In any event, records from HPD inspections and documentation provided by HPD's contractor, Creative Touch, indicate that the allegations within your protest that work was not performed by Creative Touch lack merit.

The City also submitted, as described above, numerous photos, field notes and reports, as well as before and after photos of the subject unit to show that the work had been performed. In contrast, petitioner has not produced any credible evidence in admissible form in support of its contention

that the City’s decision was made in error of law, in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion.

With respect to petitioner’s claim regarding water damage to the basement, respondent is correct in arguing that petitioner cannot seek relief, pursuant to an Article 78 proceeding, because the result of the HPD inspector’s alleged actions is not a final agency determination. Further, to the extent that petitioner seeks summary judgment under tort law, this is denied, as petitioner has neither eliminated questions of fact, nor has petitioner filed a Notice of Claim or a Complaint for damages as required under CPLR 304(a).

Finally, the court notes that there is no dispute that petitioner did not timely serve respondent, which is an additional grounds upon which the petition could have been denied.


Conclusion

For the reasons set forth herein, it is hereby:

**ORDERED** that the branch of petitioner’s filings seeking to overturn HPD’s Final Determination with respect to the Contractor’s \$15,728.63 fee, is **DENIED** on the merits, with prejudice; and it is further

**ORDERED** that the branch of petitioner’s filings seeking to recover \$52,662.72 for alleged water damage is **DENIED** without prejudice, as improperly filed; and it is further

**ORDERED** that there being no further pending applications, this proceeding is closed.

12/14/2023 DATE			 J. MACHELLE SWANSON, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE