

**Matter of Plumbers Local Union No. 1 v New York
City Dept. of Bldgs.**

2023 NY Slip Op 34404(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 160502/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of

PLUMBERS LOCAL UNION NO. 1, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, and MICHAEL APUZZO,

Petitioners,

- v -

THE NEW YORK CITY DEPARTMENT OF BUILDINGS, and ACTING COMMISSIONER KAZIMIR VILENCHIK, P.E.,

Respondents.

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INDEX NO. 160502/2022

MOTION DATE 08/08/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for LEAVE TO FILE SUPPLEMENTAL AFFIRMATION.

In this hybrid CPLR article 78 proceeding and action for declaratory relief, the petitioners/plaintiffs (hereinafter the petitioners)---a trade union local and its highest-ranking officer---move pursuant to CPLR 2214(c) and Rule 14 of Rules of the Justices of the New York County Supreme Court, Civil Branch, for leave to serve and file a supplemental affirmation in opposition to the respondents/defendants' (hereinafter the respondents) cross motion to dismiss the petition for, among other things, lack of capacity and lack of standing, which is pending under Motion Sequence 001. The respondents oppose the motion. The motion is granted, the court shall consider the proposed supplemental affirmation uploaded as docket entry 61 in the New York State Court Electronic Filing system, and the respondents shall be given time to submit a response to that affirmation.

In their petition/complaint, the petitioners sought relief (a) in the nature of mandamus to compel the respondent New York City Department of Buildings (DOB) to enforce the gas,

plumber, and welder qualifications of Admin. Code of City of N.Y. (Admin. Code) § 28-423.1 and Fuel Gas Code §§ 404.21-21.1 of Admin. Code § 28-901.2, (b) in the nature of prohibition preventing the DOB from granting gas authorization requests that do not comport with those Administrative Code provisions, and (c) for judicial review of the DOB's determinations that already had approved gas authorization requests for landowners who employed workers who did not comport with those provisions. They also seek a judgment declaring that the DOB is obligated, in the future, strictly to comply with those worker qualification provisions of the Administrative Code in granting authorizations to connect natural gas service to premises, and to deny such authorizations where the workers hired to connect gas service appurtenances do not meet the worker qualification standards set forth therein. Under Motion Sequence 001, the respondents cross-moved to dismiss the petition/complaint for lack of subject matter jurisdiction (CPLR 3211[a][2]), lack of capacity and standing (CPLR 3211[a][3]), and failure to state a cause of action (CPLR 3211[a][7]).

The petitioners request that this court consider a supplemental attorney's affirmation informing the court of several incidents that occurred or came to their attention subsequent to the submission of the respondents' cross motion, in which serious accidents or explosions occurred in the City of New York, purportedly because gas-workers or welders who failed to satisfy the Administrative Code's training and experience requirements had been involved in installing, connecting, or repairing gas service lines or pipelines. They contend that public safety and public interest considerations of those events support their standing to challenge the DOB's purported policy of ignoring the qualification requirements set forth in the Administrative Code. The respondents counter that those occurrences are irrelevant to the petitioners' legal interest in the claims set forth in the petition/complaint.

CPLR 7804(c) requires that a notice of petition in a CPLR article 78 proceeding be served at least 20 days before the return date thereof, and that an answer, if any, be served at

least 5 days before the return date. The respondent, however, “may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer” (CPLR 7804[f]). Rather than moving under a motion sequence number distinct from that assigned to the petition, the respondents here cross-moved to dismiss the petition, based on objections in point of law, under the sequence number assigned to the petition. As relevant here, CPLR 2215, applicable to cross motions, provides that “[a]t least three days prior to the time at which the motion [or petition] is noticed to be heard, or seven days prior to such time if demand is properly made . . . , a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers.” Regardless of whether the five-day period of CPLR 7804(f) or the three-day period of CPLR 2215 is applicable to a cross motion addressed to the petition in CPLR article 78 proceeding, the respondents’ cross motion was made on sufficient notice.

“Although not entirely free of ambiguity, it appears that . . . the original movant should serve his opposition to the cross-motion together with his reply on the original motion (that is, up to one day before the return date)” (David L. Ferstendig, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2215:7). The return date of the petition and cross motion in the instant matter was April 10, 2023 and, thus, the petitioners were obligated to serve their opposition to the cross motion on or before the business day immediately preceding that date, that is, on or before April 7, 2023. The petitioners did, in fact, serve and file opposition papers on that date. CPLR 2214(c) provides, in relevant part, that “[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court shall for good cause shall otherwise direct.” Thus, to be able to serve supplemental opposition papers after April 7, 2023, the petitioners were required to seek leave of this court (see *Ashton v D.O.C.S. Continuum Med. Group*, 68 AD3d 613, 614 [1st Dept 2009]; *Flores v Stankiewicz* 35 AD3d 804, 805 [2d Dept 2006]).

The court exercises its discretion and will consider the petitioners' supplemental opposition papers, since there will be no prejudice to the respondents were the court to consider those papers and because it will provide the respondents with an opportunity to respond to them (*id.*; see *Orsini v Postel*, 267 AD2d 18, 18 [1st Dept 1999]), as well as because the petitioners' are not seeking to submit the supplemental papers to correct deficiencies in their original opposition papers, but only to clarify and point out issues that may be of interest to the court (*cf. Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012] ["(s)upplemental affirmations . . . should be sparingly used to clarify limited issues, and should not be utilized as a matter of course to correct deficiencies in a party's moving or answering papers"]; *Matter of Ward v New York City Tr. Auth. Tr. Adjudication Bur.*, 63 Misc 3d 750, 753 [Sup Ct, Kings County 2019] [same]).

The court expresses no opinion as to whether the supplemental opposition papers ultimately may have any bearing on the pending cross motion.

Accordingly, it is,

ORDERED that the motion is granted, and the court shall consider the petitioners/ plaintiffs' supplemental affirmation in opposition to the cross motion, currently pending under Motion Sequence 001; and it is further,

ORDERED that, on the court's own motion, the respondents/defendants may serve a response to that affirmation on or before January 9, 2024.

This constitutes the Decision and Order of the court.

12/14/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
	SETTLE ORDER		SUBMIT ORDER		REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	