Matter of Dimeo v New York State Div. of Hous. & Community Renewal
2017 NY Slip Op 30708(U)
April 11, 2017
Supreme Court, New York County
Docket Number: 150807/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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In the Matter of the Application of

DOMINIC DIMEO,

Petitioner,

-against-

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, OFFICE OF RENT ADMINISTRATION,

Respondent,

-and-

HUNG THANH, INC.,

Respondent,

For a judgment pursuant to CPLR Article 78.

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DECISION, ORDER AND JUDGMENT

Index No. 150807/16
Seq. No. 001

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF PETITION AND VERIFIED PETITION	1-2 (Exs. A-R)
MEMORANDUM OF LAW IN SUPPORT	3
VERIFIED ANSWER OF THANH	4
VERIFIED ANSWER OF DHCR	5
AFFIRMATION IN OPPOSITION BY DHCR	6 (Exs. A-B)
MEMORANDUM OF LAW IN OPPOSITION BY THANH	7 (Ex. A)
REPLY MEMORANDUM OF LAW	8
DHCR's ADMINISTRATIVE RETURN	9

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

In this CPLR article 78 proceeding, petitioner Dominic Dimeo seeks to annul, vacate and reverse an order of the New York State Division of Housing and Community Renewal ("DHCR"), dated December 3, 2015, which denied his petition for administrative review ("PAR") of the denial of his application seeking an order directing respondent Hung Thanh, Inc. to issue him an initial residential lease that, pursuant to Loft Board Order No. 3193, Multiple Dwelling Law § 286(3), and 29 RCNY § 2-01(m)(3)(i), comports with Article 7-C of the Multiple Dwelling Law ("The Loft Law"), the Emergency Tenant Protection Act of 1974, and the Rent Stabilization Law and Code ("the application"), on the ground that such order was affected by errors of law, and granting the application in its entirety, along with such other and further relief as this Court deems just and proper. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, **the petition is denied and the proceeding is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

Petitioner Dominic Dimeo became a tenant of the third floor apartment at 429 Broome Street, New York, New York in 1974 pursuant to a Loft Lease. Ex. H to Pet.; Ex. R to Pet., at p. 1. In 2007, the building came within the jurisdiction of the Rent Stabilization Board. Id. Loft Board Order 3193, dated May 29, 2007, required the owner of petitioner's building, respondent Huang Thanh, Inc. ("HTI"), to provide petitioner with a two year residential lease for the term March 1, 2007 through February 28, 2009 at a monthly regulated rent of $1,245. Ex. D to Pet. The order stated that the lease was subject to the provisions of the Emergency Tenant Protection Act ("the ETPA") and directed HTI to register the apartment with DHCR. Id.

On November 27, 2013, petitioner filed a lease violation complaint alleging that HTI failed

to comply with Loft Board Order 3193, because it refused to offer him a rent stabilized lease at a monthly rent of $1,245.91. Ex. D to Pet.; Ex. R to Pet., at p. 1. Petitioner further asserted that he had been married in April 2010 and that his wife should thus be added to the lease. Ex. H to Pet.

HTI responded to the complaint, asserting that it complied with the Loft Law Order and, on August 27, 2007, it offered petitioner a rent stabilized lease. Ex. I. However, petitioner's attorney made several proposed changes to the lease, asserting that the agreement contained unlawful provisions, and petitioner did not execute the agreement. Id; Ex. N to Pet. In an order dated April 27, 2015, the DHCR Rent Administrator "determined that [HTI] has properly offered the first rent stabilized lease to [petitioner] as required by the Loft Board Order 3193." Ex. N to Pet. The order further stated that petitioner's rights were protected pursuant to the Rent Stabilization Code ("the RSC"). Id. Finally, the order directed HTI to add petitioner's spouse to the initial lease and renewal leases. Id.

Petitioner thereafter filed a petition for administrative review ("PAR"), asserting that the Rent Administrator ignored certain lease provisions which violated the RSC and abrogated his rights under the Loft Law. Ex. O to Pet. Petitioner asserted that, pursuant to Multiple Dwelling Law ("MDL") §286(3), when the premises became subject to the RSC, any carry-over protections of the Loft Law were required to be addressed in the first rent stabilized lease. Ex. E to Pet. Petitioner argued that HTI should strike the unlawful provisions from the lease and add his attorney's edits, which specified petitioner's rights pursuant to the Loft Law. Ex. R. to Pet, at p. 3. In support of his argument, petitioner cited *6 Greene St. Assocs. LLC v Beron*, 2002 NY Misc LEXIS 931 (App Term, 1st Dept 2002), in which the Appellate Term determined that an initial rent stabilized lease contained two provisions which violated the Loft Law and RSC 2525.6(g). Id. Petitioner also contested the

amount of the security deposit. Id., at pp. 3-4.

In opposition, HTI argued that the lease offered was appropriate. HTI maintained that petitioner's reliance on *6 Greene St.* was misplaced and that the other cases cited by petitioner merely held that any lease provisions which conflicted with the Loft Law or RSC were unenforceable. It further maintained that the petitioner could not waive any rights under the Loft Law and was also protected by the RSC. Further, petitioner asserted that the law did not require that the initial lease expressly set forth all of petitioner's rights under the Loft Law.

In an order denying the PAR ("the final order"), dated December 3, 2015, DHCR determined that:

> RSC §2522.5 does not set forth any specific requirements concerning clauses in a vacancy lease[1] other than that the lease have a one or two year term, that it state the legal regulated rent and that it not contain any illegal rent adjustment provisions. Furthermore, the RSC does not authorize the agency to evaluate specific clauses in vacancy leases as it would with renewal leases which, pursuant to RSC §2522.5(g), must be on the same terms and conditions as the expiring lease. As a general matter, where the tenant first takes occupancy pursuant to a rent stabilized vacancy lease, the landlord and tenant can negotiate provisions within the vacancy lease . . .
>
> The Rent Administrator correctly determined that the owner offered a proper initial rent stabilized lease in compliance with Loft Board Order 3193 in that the lease is a two-year rent stabilized vacancy lease effective from March 1, 2007 through February 28, 2009, at a rent of $1,245.91 per month. Loft Board Order 3193 did not specify that the vacancy lease had to contain any specific provisions which expressly state the petitioner's rights under the Loft Law. The only requirement was that the lease had to comply with the ETPA, which it does. The Rent Administrator also noted that the petitioner was protected under the RSC as a rent stabilized tenant. Moreover, the petitioner enjoyed, as a matter of law, additional protections afforded under the Loft Law pursuant to MDL §286(3). The petitioner's contention that the vacancy lease had to expressly state his rights and protections under the Loft Law is

[1] A "vacancy lease", also referred to herein as an "initial lease", is signed by a tenant moving into a rent stabilized apartment.

incorrect.

MDL §286(3) does not mandate that clauses specifying the tenant's rights under the Loft Law be included in a vacancy lease. Also, the petitioner's reliance on *6 Greene St. Assocs. LLC* is misplaced. There, the Court, not this agency, rejected a lease provision which abrogated the tenant's rights under the Loft Law. Similarly, the other cases cited by the petitioner involve the Court's scrutiny of vacancy lease provisions and do not involve this agency as a party to the proceeding. The Commissioner notes that the Court in *6 Greene St. Assocs. LLC* also stated that neither the Loft Law nor the RSC expressly require that the provisions of a former expired loft lease be incorporated verbatim in the first rent stabilized lease.

The petitioner's contention that DHCR should resolve the issue of the contested lease provisions in order to avoid potential litigation over their future enforcement is unavailing. This agency does not act prospectively to void vacancy lease provisions or rule on their legality under the Loft Law prior to any attempt by an owner to enforce them.

With respect to the issue of the security deposit, the petitioner may file a rent overcharge complaint if the owner has presently collected an excess security deposit or if the owner seeks to do so in the future.

Ex. R to pet., at pp. 4-5.

POSITIONS OF THE PARTIES:

Petitioner argues that the final order must be vacated on the ground that paragraph 1 of the initial lease impermissibly limited his occupancy to living purposes only, contrary to the certificate of occupancy, which designated the premises as "joint living/work quarters." Petitioner further asserts that the initial lease contained language improperly allowing HTI to prevent petitioner from occupying the premises. Next, petitioner maintains that paragraph 10 of the lease is improper since it conflicts with MDL §286(3), which provides that petitioner owns any improvements he makes to the premises. In addition, petitioner argues that the lease does not contain language sufficient to

protect his rights pursuant to the MDL and RSC. Petitioner also maintains that paragraph 11(c) of the lease is improper since it purports to allow HTI to claim legal expenses as additional rent. Further, petitioner maintains that the proposed lease does not account for the overcharge in the amount of the security deposit.

In opposition to the petition, DHCR argues that its final order should not be annulled since it correctly followed the applicable law in rendering the same. DHCR also asserts that petitioner is not entitled to a writ of mandamus compelling it to annul its final order or to re-write portions of the lease since petitioner cannot compel it to perform an act involving an act of discretion or judgment.

In its opposition to the petition, HTI argues that, since petitioner cannot waive any of its rights under the RSC and the Loft Law, there is no reason for the lease to specifically set forth petitioner's rights in the lease.

In his reply memorandum of law, petitioner argues that, given the unlawful provisions in the initial lease, DHCR's finding that the initial lease complied with Loft Board Order 3193 was a clear error of law. Petitioner further maintains that he is not asking DHCR to rewrite the initial lease, but rather to issue him a compliant initial lease.

CONCLUSIONS OF LAW:

A review of DHCR's final order reveals that it was not affected by an error of law. *See Matter of Kobrick v New York State Div. of Hous. & Community Renewal*, 126 AD3d 538, 539 (1st Dept 2015) citing *Matter of Bambeck v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 129 AD2d 51, 54-55 (1st Dept 1987), *lv denied* 70 NY2d 615 (1988). Indeed, where, as here, an agency interprets the statutes and regulations it administers, such interpretation is entitled

to great deference, which must be upheld if it is reasonable. *See Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007); *see also Matter of Chin v New York City Bd. of Stds. & Appeals*, 97 AD3d 485 (1st Dept 2012) (if statute susceptible to conflicting interpretations, agency's interpretation is entitled to great deference and must be upheld so long as it is reasonable).

Despite petitioner's argument that his initial lease should have contained numerous additional provisions to protect his rights, it is evident from the final order that DHCR thoroughly addressed his contentions and found them to be without merit.[2] In doing so, DHCR correctly stated, among other things, that the lease provided to petitioner was a proper initial rent stabilized lease. DHCR properly determined that, contrary to petitioner's argument, RSC § 2522.5 does not require that an initial rent stabilized lease set forth any specific provisions other than that it provides for a one or two-year term, that it state a legal regulated rent, and that it not contain any illegal rent adjustment provisions. It also correctly determined that MDL §286(3) does not mandate that clauses specifying the tenant's rights under the Loft Law be included in a vacancy lease.

Moreover, DHCR reasonably declined to rule prospectively on allegedly improper lease provisions since a challenge to such a provision would not arise until enforcement of the subject term was sought.

Further, DHCR correctly ruled that, to the extent petitioner seeks to compel it to issue him a new lease, it is without power to do so. "An article 78 mandamus proceeding may be brought to

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[2]Curiously, although petitioner's attorney insisted that certain provisions be added to petitioner's lease for the latter's protection (Ex. R to Pet., at p. 3), petitioner concedes that "no specific provisions were required to be included in the lease." Pet.'s Reply Memo. Of Law, at p. 4.

compel an agency 'to perform a duty enjoined upon it by law' (CPLR 7803[1]). It is well-settled that a mandamus to compel 'applies only to acts that are ministerial in nature and not those that involve the exercise of discretion' (*Matter of Maron v Silver*, 14 NY3d 230, 249 [2010]). Thus, 'the petitioner must have a clear legal right to the relief demanded and there must be a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief' *(Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842 [1st Dept 2005] [internal quotation marks omitted])." *Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 152 (1st Dept 2015). Since it is beyond peradventure that because an order by DHCR directing HTI to issue a new lease to petitioner would "require DHCR to rewrite lease clauses" (DHCR's Aff. In Opp., at par. 36), and thus be discretionary in nature, a writ of mandamus cannot be issued herein.

The case principally relied on by petitioner, *6 Greene St. Assocs. LLC v Beron*, 2002 N.Y. Misc. LEXIS 931 (App Term 1st Dept 2002), does not warrant the annulment of the final order. In that case, an ejectment action, plaintiff/landlord sought possession of a former loft upon defendant/tenant's refusal to execute a rent stabilized lease upon the conversion of a building from interim multiple dwelling to rent stabilized status. The Loft Board directed plaintiff to provide defendant with a lease which complied with the RSC. However, the lease offered by plaintiff limited defendant's occupancy to living purposes only "and for no other reason", which was contrary to the certificate of occupancy and zoning resolution allowing the apartment to be used for "joint living work quarters" and conflicted with the use of the premises as an artist's studio and residence since 1976. Second the lease contained a standard provision that any installations or alterations by defendant would become the property of plaintiff. Thus, held the Appellate Term, defendant was justified in rejecting the lease and was not subject to eviction for failing to sign it.

As DHCR asserts, *6 Greene St. Assocs.* is distinguishable from this case since insofar as in that matter, "the Court, not [DHCR], rejected a lease provision which abrogated the tenant's rights under the Loft Law." Final Order, at p. 5. Additionally, as DHCR notes, the Appellate Term stated in *6 Greene St. Assocs.* that "neither Article 7-C of the [MDL] [the Loft Law] or [the RSC] expressly requires that the provisions of a prior expired loft lease be incorporated verbatim in the first stabilized lease." *6 Greene St. Assocs. LLC v Beron*, at *2. Further, that case was an ejectment action and not an article 78 proceeding. To the extent that petitioner's lease permitted the premises to be used for "living purposes only", such did not prevent him from using the same for other purposes since, as DHCR stated in its final order, he "enjoyed, as a matter of law, additional protections afforded under the Loft Law pursuant to MDL 286(3)." Final Order, at p. 5. Moreover, as DHCR asserts, since the "living purposes only" clause could not be enforced against petitioner, this did not prevent the latter from executing the lease.

Therefore, in light of the foregoing, it is hereby:

ORDERED AND ADJUDGED that the article 78 petition is denied and the proceeding is dismissed; and it is further,

ORDERED that counsel for DHCR may retrieve the Administrative Return from the Clerk of Part 2 at 80 Centre Street, Room 280; and it is further,

ORDERED that this constitutes the decision and judgment of the court.

DATED: April 11, 2017

ENTER:

Hon. Kathryn E. Freed, J.S.C.