SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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KENT AVE HOLDINGS I LLC,

Plaintiff-Petitioner,

Index No.: 158297/2017

For a Judgment Pursuant to Articles 30 and 78 of the Civil Practice Law and Rules,

DECISION AND ORDER

-against-

NEW YORK CITY LOFT BOARD,

Defendant-Respondent.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this proceeding pursuant to Article 78 of the CPLR, plaintiff-petitioner Kent Ave Holdings I LLC ("Petitioner") seeks an order setting aside the May 18, 2017 ruling of the Loft Board, denying its October 29, 2015 application for an extension to file for code compliance under 29 RCNY § 2-01 (b) (1) (i) (the "Regulation"), as well as a judgment declaring the definition of "new owner" contained in the Regulation as *ultra vires* and void. Defendant-Respondent New York City Loft Board ("Respondent") interposed a Verified Answer and cross-moves to dismiss the Verified Article 78 Petition and declaratory judgment complaint on the ground that, pursuant to CPLR 3211 (a) (7), Petitioner has failed to state a cause of action.

BACKGROUND FACTS

Kent Avenue Holdings LLC ("Kent Holdings"), Petitioner's predecessor-in-interest, is the former triple net lessee of 151 Kent Avenue, Brooklyn, New York (the "Building"), pursuant to a written lease agreement, dated January 5, 2012, by and between the owner of the Building,

FNW Realty Corp. ("FNW"), as lessor, and Kent Holdings, as lessee (the "Former Triple Net Lease") (Verified Petition, Exhibit "B"). Pursuant to the Former Triple Net Lease, Kent Holdings was solely responsible for all aspects of the Building's operations including the leasing of the Building to tenants, payment of utilities, real estate taxes and insurance premiums, and the performance of all repairs and maintenance. The Former Triple Net Lease also required Kent Holdings to perform and complete all work necessary to obtain a final residential certificate of occupancy for the Building by a date certain (*id.*, ¶¶ 15-18, Exhibit "B").

According to Petitioner, Kent Holdings was required to obtain a final residential certificate of occupancy or, at the very least, a temporary residential certificate of occupancy on or before August 1, 2015 (*id.*, ¶ 18). On or about March 21, 2012, Kent Holdings voluntarily registered the Building with the Loft Board. On its application, Kent Holdings is listed as the Managing Agent and FNW is listed as the owner of the Building. Mor Weiss is listed as the president of FNW, Eva Weiss is described as the vice president of FNW and Marianna Seidenfeld is stated to be the secretary of FNW (*id.*, Exhibit "D").

Petitioner maintains that by July 2015, it became clear to FNW that Kent Holdings would default on its legalization obligations, "in that Kent Holdings had failed to take the necessary steps to obtain either a temporary residential Certificate of Occupancy or a final residential Certificate of Occupancy by August 1, 2015" (*id.*, ¶ 26). Petitioner states that in or about July 2015, FNW notified Kent Holdings that it would exercise its right to cancel the Former Triple Net Lease (*id.*, ¶ 28). After Kent Holdings surrendered its interest in the Former Triple Net Lease to FNW, FNW arranged for Petitioner to assume control of the Building (*id.*, ¶¶ 29-30). On August 1, 2015, FNW entered into a new seven-year loft lease with Petitioner (*id.*, Exhibit

"G"). Norman Seidenfeld executed the new lease on behalf of Petitioner. Seidenfeld is the son-in-law of Mor Weiss, the president of the owner, FNW (*id.*, ¶ 31).

Under this new triple net lease between FNW and Petitioner (the "Triple Net Lease"), "all of Kent Holdings' responsibilities as the triple-net lessee under the Former Triple Net Lease, as well as exclusive control of the Building, were conveyed to [Petitioner] . . ." (*id.*, ¶ 33). Further, under this lease, Petitioner agreed to do "all the work necessary to obtain a residential certificate of occupancy for the residential portions of the subject building at its own cost and expense within forty-two (42) months" (Verified Answer, ¶ 58, citing Verified Answer, Exhibit "H" (standard form of loft lease) at Rider, ¶ 39).

In its Verified Petition, Petitioner asserts that "almost immediately after acquiring its interest in the Building, [Petitioner] began its good faith efforts to legalize the Building for residential use" (*id.*, ¶ 36). After taking different measures to bring the Building into compliance, Petitioner filed an application on or about October 29, 2015, seeking an extension of the code compliance deadlines. Petitioner argued that it was entitled to an extension because it was a "new owner" within the meaning of 29 RCNY § 2-01(b) (1) (i), as a lessee is an "owner" pursuant to the definition of "owner" set forth in Multiple Dwelling Law ("MDL") § 4 (44) and because it had made good faith efforts to legalize the Building for residential use (*id.*, Exhibit "H").[1]

By letter, dated September 28, 2016, Helaine Balsam, Esq., Executive Director/General Counsel of the Loft Board, notified Petitioner that its application for an extension of code

[1] Petitioner also argued that as a lessee, it qualifies as an owner under Multiple Dwelling Law MDL § 4 (44).

compliance deadlines was denied, as Petitioner was not entitled to an extension based on "new owner" status under the Regulation ("Administrative Determination") (*id.*, Exhibit "I"). On November 14, 2016, Petitioner filed an administrative appeal of this decision, and in a May 18, 2017 Report and Recommendation, the Loft Board recommended denial of Petitioner's administrative appeal ("Report and Recommendation") (Verified Petition, Exhibit "A").

Petitioner commenced this Article 78 proceeding challenging the Loft Board Order, dated May 18, 2017, accepting such Report and Recommendation (*id.* [Loft Board Order 4669] (the "Loft Board Appeal Determination").

DISCUSSION

Petitioner argues that the definition of "new owner" in the Regulation is *ultra vires* and should be annulled

On or about October 29, 2015, Petitioner filed an application seeking a retroactive extension of the code compliance guidelines, pursuant to the Regulation, 29 RCNY § 2-01 (b) (1) (i), on the ground that Petitioner is a "new owner" and should be granted an extension pursuant to MDL § 284 (1). Under MDL § 284, an owner of an interim multiple dwelling ("IMD") is obligated to achieve compliance with safety and fire protection standards as specified in Article 7B of the MDL and to obtain a residential certificate of occupancy, among other requirements. As a result of the Loft Board's denial of its application, Petitioner herein seeks a judgment determining that the definition of "new owner" in the Regulation is *ultra vires*, as it conflicts with the definition of "owner" set forth in the MDL § 4, and should, therefore, be annulled.

In support of its Petition, Petitioner further argues that "it is black letter law that administrative agencies lack the power to promulgate regulations that run counter to the

implementing statute" (Petitioner's Memorandum of Law at 2, citing *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). Specifically, Petitioner argues that the plain language of the relevant state statute, MDL § 284, provides that "[a]n owner who is unable to satisfy any requirement specified in . . . this subdivision for reasons beyond his/her control . . . may apply to the loft board for an extension of time to meet the requirement specified in . . . this subdivision" (*id.* at 3).

The term "owner" is defined in MDL § 4 (44) as "the owner or owners of the freehold of the premises or . . . lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling" (*id.*). Petitioner argues, therefore, that because a triple net lessee is a lessee directly in control of a dwelling, a triple net lessee is an "owner" under the MDL. As such, Petitioner argues that "wherever the term "owner" appears in the MDL, including in MDL § 284, it may be substituted with any of the parties defined as "owner" in MDL § 4 (44), including a lessee, and therefore a triple net lessee" (Petitioner's Memorandum of Law at 4).

Petitioner further adds that there is no language in the MDL § 284 stating that only a fee owner may obtain an extension of the deadlines, and therefore the Legislature must have intended that all parties that qualify as an "owner" under MDL § 4 (44), qualify for an extension under MDL § 284 (*id.*).

Pursuant to the Regulation, 29 RCNY Section 2-01 (b) (1), an owner may file an application with the Loft Board for an extension of legalization deadlines. However, an application for such an extension must be filed before the deadline for which the extension is sought. However, the rule provides two exceptions, which are for: (1) "new owners" of [interim multiple dwellings (IMD's)], or (2) buildings that are only found to be covered as IMD's after

the code compliance deadlines have already passed. In these situations, the owner has 90 days to seek an extension after the qualifying event occurs. The Regulation provides, in relevant part, as follows:

> "(b) Extensions of time to comply with the amended code compliance timetable.
>
> (1) Extension of current deadlines. Pursuant to MDL § 284 (1), an owner of an IMD building may apply to the Loft Board for an extension of time to comply with the code compliance deadlines provided in MDL § 284 in effect on the date of the filing of the extension application. An application for an extension must be filed before the deadline for which an extension is sought, except as provided in (i) through (iv) below:
>
> (i)Where title to the IMD was conveyed to a "new owner" after the code compliance deadline has passed, the new owner may file an extension application for the past deadline within 90 calendar days from acquiring title. For the purposes of this paragraph, "new owner" is defined as an unrelated entity or unrelated natural person(s) to whom ownership interest is conveyed for a bona fide business purpose and not for the purpose of evading the code compliance deadlines of the MDL or any other law" (29 RCNY § 2-01(b) (1) (i)).
>
> In the Statement of Basis and Purpose on September 28, 2006, the Loft Board stated:
>
> "Extensions should be granted only to diligent owners who are in the process of complying with the Loft Law but are unable to meet the next deadline due to a condition or circumstance beyond their control. There is no acceptable reason an owner could not bring such circumstances to the Loft Board's attention and seek appropriate relief before the expiration of the deadline. The only exception provided is for owners who recently bought their IMD buildings. Such owners would be given 90 days after taking title to seek an extension of a missed code compliance deadline…" (Report and Recommendation, dated April 25, 2017 at 2).

In the April 25, 2017 decision on Petitioner's appeal, the Loft Board noted that on March 21, 2012, the Building was registered with the Loft Board, and on October 29, 2015, Petitioner filed an application requesting a retroactive extension of the code compliance deadlines as a "new owner". In that decision, the Loft Board further noted that [t]he applicable code deadlines have expired. Yet to date, neither Owner nor an entity in its behalf has met three out of the four

code compliance deadlines. Therefore, the only way Lessee [Petitioner] would be entitled to an extension is if Lessee [Petitioner] qualifies as a "new owner" (Verified Petition, Exhibit "A" [Report and Recommendation] at 2). In the decision, the Loft Board cites the above history of 29 RCNY § 2-01 (b), by stating that in September 2006, the Loft Board eliminated retroactive extensions of the code compliance deadlines.

In New York, "where the rules or regulations of an administrative agency are in conflict with the provisions of the statute or inconsistent with its design and purpose, they are to be held invalid" (*Matter of Association of Commercial Prop. Owners v New York City Loft Bd.*, 118 AD2d 312, 314 [1st Dept 1986] [internal quotations and citation omitted], *affd* 71 NY2d 915 [1988]). "The challenger of a regulation must establish that the regulation is so lacking in reason for its promulgation that it is essentially arbitrary" (*id.* at 315 [internal quotation marks and citation omitted]). "[T]he Loft Board's interpretation of its own regulations should be upheld if not irrational or unreasonable" (*Matter of 902 Assoc. v New York City Loft Bd.*, 229 AD2d 351, 352 [1st Dept 1996]. "The Loft Law (Multiple Dwelling Law art. 7-c) [which is remedial in nature] is to be liberally construed to spread its beneficial effects as widely as possible, [i.e. where the measures of the Loft Board are likely to result in code compliance]" (*id.*). New York courts defer to the governmental agency charged with the "responsibility for administration of the statute. When such deference is appropriate, the courts will not disturb the Appeal Board's interpretation of the provision if it is supported by a rational basis" (*Matter of Gruber (New York City Dept. of Personnel-Sweeney)*, 89 NY2d 225, 231 [1996]).

The Regulation, 29 RCNY § 2-01 (b) (1) (i), is not in conflict with the provisions of MDL § 284]. MDL § 284 permits an owner to apply to the Loft Board for an extension of time

to meet the deadlines but makes no mention of applications for retroactive extensions.[2] MDL § 284 does not offer any guidance as to how the Loft Board should address the circumstance where the owner missed the filing deadline(s) and seeks to retroactively file an application for an extension. Within MDL § 284, there is no language concerning retroactive filing for an extension of time to file.

The Regulation, consistent with the state statute, offers the opportunity to all owners, including net lessees, to file an application for an extension. Yet, unlike the statute, the Regulation additionally addresses the issue of retroactive applications. On this subject, the Regulation expressly limits the right to seek an extension to those who file before the deadline. In addition, the Regulation provides an opportunity to "new owners," to apply retroactively for an extension, after the deadline has passed. A "new owner" is provided this opportunity as one who purchased the building after the deadlines past, and, therefore, had no ability to timely file an application for an extension of time to comply with the deadlines provided in the MDL.

In the administrative appeal of this matter, the Loft Board offers rational support for this Regulation. In its Report and Recommendation, the Loft Board states:

> "Considering the clear and unambiguous stated purpose for the 'new owner' exception, the Loft Board intended to be particular about the type of owner who could obtain an extension after a code compliance deadline. Only a fee owner, who recently purchased an IMD building, may file for an extension after the code compliance deadlines. Therefore, transfer of title is required. . . To hold otherwise would reward an IMD owner

[2] MDL 284 (1) (i) provides that, "the loft board may, upon good cause shown, and upon proof of compliance with the standards of safety and fire protection set forth in article seven-B of this chapter, twice extend the time of compliance with the requirement to obtain a residential certificate of occupancy for periods not to exceed twelve months each." The statute states when an owner who has not complied with the requirements of the previous paragraph to meet these deadlines, there are new dates set forth for compliance. The statute, however, does not specifically address the circumstance where an owner fails to file for an extension of the dates after the dates have already expired.

> that essentially delegated its obligation under MDL § 284 (1). The Loft Board has long held that the obligation to legalize pursuant to MDL § 284 (1) is nondelegable by lease or any other agreement" (Petition, Exhibit "A" [Report and Recommendation] at 3).

MDL § 284 granted the authority to the Loft Board to consider applicants for an extension of the MDL deadlines. Whereas MDL § 4 (44) uses and defines the term "owner" to include a lessee, only the Regulation uses and defines the term "new owner." "New owner" only applies to fee owners, in the context of creating a right to file a retroactive application. The Regulation is consistent with the purpose of the Loft Law, which is to efficiently and expeditiously legalize an IMD for the health and safety of the residents (*see* MDL §280; *Matter of Mapama Corp. v New York City Loft Bd.*, 30 Misc 3d 1234(A), 2011 NY Slip Op 50355 [u], *4-5 [Supreme Ct, New York County 2011] ["In this matter, the owner commenced the legalization process in 1983. Almost three decades later, the owner still does not have a residential certificate of occupancy. The failure to comply with the statutory and regulatory mandates frustrates the purpose of the Loft Law"], *affd by* 95 AD3d 785 [1st Dept 2012]).

Furthermore, the Loft Law is consistent with the MDL and, because the use and definition of the term "new owner" addresses a condition not addressed in the state statute, it does not add any additional qualifications to the rights set forth in that statute (*see cf Thorgeirsdottir v New York City Loft Bd.*, 161 AD2d 337, 339 [1st Dept 1990] ["The Loft Board has no authority to add additional conditions or to impose further qualification to an entitlement or status declared by the statute"], *affd* 77 NY2d 951 [1991]). As stated by the Loft Board, the subject Regulation defines a wholly distinct term-"new owner" and requires that only "new owners" be permitted to obtain extensions of code compliance deadlines (Verified Petition, Exhibit "A" at 3).

As such, the definition of "new owner" in the Rule is not *ultra vires* and is consistent with the Loft Law's purpose to ensure that IMD's comply with applicable laws to protect the health, safety and welfare of the public.

Petitioner argues that the decision of the Loft Board is arbitrary and capricious

An administrative determination is arbitrary or capricious if made "without sound basis in reason" and "taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Courts may not substitute their judgment if a rational basis supports the determination (*Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).

Petitioner argues that the Loft Board's decision, which failed to recognize Petitioner as an owner, was arbitrary and capricious. Petitioner offers examples of other Loft Board decisions, in which the Loft Board, according to Petitioner, treated net lessees the same as fee owners "for the purposes of the registrations and housing maintenance standards" (Memorandum of Law in Support of Verified Petition at 11). Petitioner concludes: "[Respondent's] recognition of a net lessee as an "owner" for Loft Law purposes in other instances, while refusing to do so here, is arbitrary, capricious and contrary to law" (*id.*).

In its opposition, the Loft Board maintains that this argument by Petitioner is without merit. Specifically, the Loft Board argues that:

> "[t]he rule challenged here, on the other hand, was promulgated to eliminate retroactive extension of the code compliance deadlines and to prevent evasion of those deadlines. Simply, the term 'owner' as defined by the Loft Law and the term 'new owner' as defined by the Loft Board rules are not the same term, and it is reasonable and rational for the Loft Board to interpret those terms differently in the contexts in which they are applicable" (Respondent's Memorandum of Law at 13).

Petitioner argues that the Loft Board's decision is not supportable. Petitioner contends that because it leased the Building after the expiration of the deadlines, it had no control over the circumstance of filing for an extension beyond the deadlines. Petitioner states that it is, therefore, in the position of a "new owner" as envisioned by the Regulation. Petitioner argues that the Loft Board's decision is making it more difficult for the Petitioner with respect to the Building's legalization, because it pays rents to the fee owner, but is unable to collect rents from the tenants, due to its predecessor's lack of compliance with the code. As a consequence Petitioner maintains it is deprived of the revenue to perform the work necessary to legalize the Building.

The Loft Board's determination denying Petitioner's request for a retroactive extension has a rational basis. The Loft Board has offered a reasoned explanation for its determination. It is undisputed that Petitioner filed for an extension of the code compliance deadlines after those deadlines had expired. It is also undisputed that Petitioner is not the fee owner of the property but is a net lessee. Finally, there is no dispute that Petitioner is related to FNW, the fee owner. Additionally, in the Loft Board decisions cited by Petitioner, *Matter of the Application of Bernard McElhone*, *Matter of Dexter* and *Matter of Gurkin*, the Loft Board does not address legalization under MDL § 284. These cases do not pertain to MDL § 284 or 29 RCNY § 2-01 (b) (1) (i). Accordingly, in its decision, the Loft Board found that Petitioner does not qualify as a "new owner" under 29 RCNY § 2-01 (b) (1) (i) and, therefore, cannot file the application retroactively.

In its decision, the Loft Board opined:

> "In addition, adopting the Applicant's definition would allow owners to circumvent the code compliance deadlines simply by finding other parties to

> whom they could net lease the property. The Loft Board invalidated this interpretation when it held that 'owners cannot evade responsibility for their inaction by delegating their code compliance-obligations to a net lessee . . . at a time when they were out of compliance and, indeed, had failed to take any substantial compliance actions at all . . .' The same is true in this case. The owners net leased this property at a time they were out of compliance, *see* Application at 8-10 and Applicant admits that 'virtually nothing had been done to legalize the Building for residential use when Applicant took control of the Building'" (Administrative Determination at 3) [internal citation omitted].

In its Appeal Determination, the Loft Board additionally found that "the rule defines "New Owner" as an *unrelated* entity to whom an ownership interest is conveyed . . .. Lessee is not an unrelated entity (Petition Exhibit "A" [Report and Recommendation] at 2). By its own admission, Lessee is a related business entity. The principal of Lessee is the son-in-law of the principal of Owner" (*id*). The Loft Board addresses Petitioner's argument that its relationship to the prior lessee is the one that should be determinative and not its relationship to FNW, the owner. On this point, the Loft Board stated that "only fee owners who recently purchased an IMD in an arms-length transaction would be entitled to an extension, if they can show progress on the legalization effort within 90 days of acquiring title. Therefore, the relationship between Lessee and the Prior Lessee is immaterial. The relevant relationship is between the prior fee owner and the new fee owner. The prior fee owner must be unrelated to the new fee owner." (*id.* at 2-3).

Consequently, the Loft Board has reasonably determined that Petitioner is unable to meet the requirements under the Regulation, 29 RCNY 2-01 (b) (1) (i). The decision has a rational basis and will not be disturbed by this Court. Finally, as this matter is dismissed, the Court need not reach any determination on the Loft Board's cross-motion to dismiss as it is moot.

CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed, with costs and disbursements to Respondent; and it is further

ORDERED and ADJUDGED that the cross-motion to dismiss is deemed moot.

Dated: December 24, 2018

ENTER:

J.S.C. SHLOMO HAGLER
J.S.C.