SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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JO-FRA PROPERTIES, INC.,

Petitioner,

-against-

THE NEW YORK CITY LOFT BOARD AND LELAND BOBBE, ROBIN BOBBE, JERRY MORIARTY, MICHAEL COMBS, GLEN HANSEN, SHAUNA HANSEN, NANCY HAGIN, COLIN BROWN, CARA NEGRYCZ, SOPHOCLES STAVRI AND JANINE STAVRI (TENANTS of 51-55 West 28th Street),

Respondents.

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MEMORANDUM DECISION AND JUDGMENT

Index No.: 109963/2010

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HON. MARTIN SCHOENFELD, J.:

In this Article 78 proceeding, Petitioner Jo-Fra Properties, Inc. (Jo-Fra) seeks to vacate Loft Board Order No. 3570 (LBO 3570) made by the Respondent The New York City Loft Board (the Board), which granted the Overcharge Applications of Respondent-Tenants Leland Bobbe, Robin Bobbe, Jerry Moriarty, Glen Hansen, Shauna Hansen, Michael Combs, Nancy Hagin, Colin Brown, Cara Negrycz, Sophocles Stavri and Janine Stavri (the Tenants) and awarded rent overcharges for September 1, 2004 to September 30, 2007. For the reasons set forth below, the application is denied and the petition is dismissed.

BACKGROUND

Jo-Fra is the owner of the buildings known as 51 West 28th Street, 53 West 28th Street and 55 West 28th Street (the Premises) located in New York City, which are the focus of this petition. On or about August 27, 2004 the Tenants filed a Loft Law Coverage Application with the Board asking it to classify their units in the Premises as Interim Multiple Dwellings (IMDs). Jo-Fra opposed the Coverage Application, asserting several equitable affirmative defenses such as waiver, estoppel and laches. Jo-Fra pursued these claims in the Supreme Court and the Appellate Division[1] which resulted in dismissal after approximately three years of litigation. *In re Jo-Fra Properties, Inc.*, 8 N.Y.3d 801 (2007). Upon completion of this litigation, on August 28, 2007, the parties appeared at the Office of Administrative Trials and Hearings (OATH) before ALJ Faye Lewis and entered into a stipulation of settlement. The Tenants agreed to withdraw their Coverage Applications without prejudice and Jo-Fra agreed to register the Premises as IMDs. Pursuant to the stipulation, Jo-Fra filed its IMD Registration Application with the Board for the Premises on Monday, October 1, 2007. Verified Answer Exhibit I. By letter dated October 9, 2007, the ALJ returned the file to the Board and advised that the matter had been settled. Verified Answer Exhibit J.

On February 29, 2008, the Board rejected Judge Lewis' October 9th letter and in Order No. 3407 granted Tenants' Coverage Application finding the Premises to be IMDs subject to the

[1]The Supreme Court denied Jo-Fra's motion to remove to the Supreme Court to hear its equitable defenses. The Appellate Division affirmed in 2006, 27 A.D.3d 298 (1st Dept. 2006), and the Court of Appeals denied Jo-Fra's leave to appeal in 2007. *In re Jo-Fra Properties, Inc.*, 8 N.Y.3d 801 (2007).

Loft Law. Verified Answer Exhibit P. Jo-Fra then filed an Article 78 petition seeking to correct this order to reflect that the Tenants' Coverage Applications had been withdrawn and the basis of coverage under the Loft Law was its October 2007 Registration Application. This petition was subsequently granted by Supreme Court Justice Schlesinger. Verified Answer Exhibit R.

On July 25, 2008, the Tenants filed applications with the Board seeking a finding of rent overcharges for excess rent collected by Jo-Fra during the period between September 1, 2004 through and including September 30, 2007. Jo-Fra filed Answers to the Tenants' Overcharge Applications asserting that 29 RCNY 1-06.1(c), the Loft Board regulation governing the timing of Overcharge Applications, prohibited the Board from awarding overcharges prior to October 1, 2007, the filing date of Jo-Fra's Registration Application. In contrast, the Tenants argued that under this rule they could proceed with their claim because the overcharge period commenced with the filing of their Coverage Application. The Board transferred the Tenants' Overcharge Applications to OATH, which assigned them to ALJ Alessandra F. Zorgniotti for adjudication.

On September 9, 2009, ALJ Zorgniotti held a hearing on the Tenants' Overcharge Applications. On October 27, 2009 she issued a recommendation that the Board grant the Tenants' Overcharge Applications. This recommendation included a calculation of the overcharge amount due. The ALJ relied on an earlier decision she had made in the case which found that 29 RCNY 1-06.1(c) did not bar an award of overcharge prior to October 1, 2007 despite the fact that, pursuant to the stipulation that the Tenants had entered into with Jo-Fra, the Tenants had withdrawn their Coverage Application in 2007. Verified Answer Exhibit Y.

On April 15, 2010, the Loft Board issued LBO 3570, in which the Board agreed with the ALJ and granted the Tenants' Overcharge Applications for the period September 1, 2004 through

September 30, 2007. In finding for the Tenants, the Board wrote that:

> There is nothing in this rule that bars applying the filing date of a coverage application simply because it was subsequently withdrawn. The rule does not distinguish between coverage applications that have a finding of coverage by the Loft Board and those applications that are withdrawn. The focus of the rule is the filing date because it provides notice to the Owner of a potential Article 7-C coverage and overcharge liability if the Tenants' units are subject to rent regulation. **The ultimate resolution of the application is irrelevant. It is the filing that triggers the notice.**

Verified Answer Exhibit Z at 3. (emphasis added).

The Board found that the filing of the Tenants' Coverage Applications had placed Jo-Fra on notice of possible liability for rent overcharges.

Jo-Fra now brings this Article 78 proceeding challenging the Board's decision.

DISCUSSION

Ordinarily, judicial review of an Article 78 proceeding is limited to whether an administrative determination is "arbitrary and capricious or lacks a rational basis." *Chelrae Estates, Inc. v. State Division of Housing and Community Renewal*, 225 AD2d 387, 389 (1st Dept. 1996) (citing *Pell v. Board of Education of Union Free School District*, 34 N.Y.2d 222, 230-31 (1974)); *Nur Ashki Jerrahi Community v. New York City Loft Bd.*, 80 A.D.3d 323, 331 (1st Dept. 2010). A decision is arbitrary and capricious if it is "without sound basis in reason and [is] generally taken without regard to the facts." *Pell*, 34 N.Y.2d at 231. A court "may not substitute its judgment for that of" the administrative body. *Id.* at 232 (citations omitted).

In addition, when reviewing the administrative agency's interpretation of a law or regulation, courts give deference to the agency's expertise in interpreting the rule so long as it's interpretation "is not irrational or unreasonable." *Albano v. Kirby*, 36 N.Y.2d 526, 532 (1975);

902 Assoc. V. New York City Loft Bd., 229 A.D.2d 351, 352 (1st Dept. 1996) ("the Loft Board's interpretation of its own regulations should be upheld if not irrational or unreasonable"); *Lower Manhattan Loft Tenants v. New York City Loft Bd.*, 104 A.D.2d 223, 224 (1st Dept. 1984). Only where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" and not on the expertise of the agency, is deference not afforded. *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270, 285 (2009) (internal citations and quotations omitted); *Belmonte v. Snashall*, 2 N.Y.2d 560, 565-66 (2004); *Smith v. Donovan*, 61 A.D.3d 505, 508-09 (1st Dept. 2009). In such cases, "where the language of the statute is clear on its face, it should be construed so as to give effect to its plain meaning." *Liberty Lines Express v. New York City Envtl. Control Bd.*, 160 A.D.2d 295, 296 (1st Dept. 1990).

Here, Jo-Fra argues that no deference to the Board is due because under the plain meaning of 29 RCNY § 1-06.1(c) the date of filing of its Coverage Registration and not the Tenant's Coverage Application must be used to determine the overcharge amount. The rule reads:

> An application for rent overcharges shall be filed within four years of such overcharge. Overcharges **shall not** be awarded for the period prior to the **date of filing of a coverage or registration application**, nor for more than four years before the date on which the application for overcharge was filed.

29 RCNY § 1-06.1(c) (emphasis added).

Jo-Fra argues that under the plain meaning of this provision the "disjunctive *or* shows that the date of filing, *coverage or registration application*, acts independently to limit the time period" that may be used for an overcharge determination and that the words "shall not" are a mandatory prohibition against overcharge awards prior to the date of either filing. Petitioner's

Memorandum of Law at 12 (emphasis in original). It concludes that, where both Coverage and Registration Applications have been filed, the plain meaning of the rule mandates that overcharges "shall not" be awarded prior to the latter of the filing dates. Here, Jo-Fra filed its Coverage Registration several years after the Tenants' application and thus, under Jo-Fra's reading of the rule, coverage could not be granted prior to this latter date.

In addition, Jo-Fra contends that the use of the word "or" between the two types of applications makes clear that only one of the two filings will result in coverage and it's that one (the one that actually results in coverage) that gives the Board the authority to determine overcharges. Petitioner's Memorandum of Law at 14. Accordingly, Jo-Fra's Registration Application, not the Tenants' withdrawn Coverage Application, resulted in coverage and therefore should be used to determine the overcharges. Jo-Fra offers no legislative history to support its argument but merely contends that the meaning is so plain that the court needs to look no further than the text to determine the legislative intent of the provision.

This Court is unconvinced by Jo-Fra's strained interpretation of the regulation. As the Board points out in its arguments, a more reasonable and natural reading is that the "or" between "date of filing of a coverage [application] and "registration application" means that filing of either type of application would be sufficient as a starting point to determine overcharges. *See Matter of Pessoni*, 11 Misc.3d 245, 248 (Surrogate's Court, Cortland Cnty 2005). In addition, nowhere in the provision does it distinguish between an application that results in coverage and one that does not. The language simply requires the "filing" of an application. In wording the rule thus, the unusual scenario here, where **both** the tenants and the landlord filed for coverage, was most probably not contemplated. It is exactly this type of unanticipated situation where the

Court should defer to the agency's – in this case the Loft Board's – "special expertise" in interpreting the rule's language. *See 902 Associates*, 229 A.D.2d at 352.

Here, as stated previously, in reviewing the provision the Board found that "[t]he focus of the rule is the filing date because it provides notice to the Owner of a potential Article 7-C coverage and overcharge liability if the Tenants' units are subject to rent regulation." Verified Answer Exhibit Z at 3. In the case at bar, Jo-Fra was put on notice that it could be responsible for overcharge payments at the time the Tenants filed their application for coverage in 2004. This interpretation of 29 RCNY § 1-06.1(c) is both reasonable and rational. In fact, it is Jo-Fra's interpretation that would render an unreasonable result. As the Board points out, if Jo-Fra's interpretation was adopted, a tenant's ability to establish the date from which overcharges would begin would be rendered meaningless. An owner could simply file a Registration Application at anytime after the Tenant's Coverage Application and before coverage has been determined, thereby establishing a later date from which to determine overcharges. In this way owners could use the rule to unfairly limit the overcharges due the tenants. Such a result would be inconsistent with the legislative intent of the Loft Law. *See 902 Assoc.*, 229 A.D.2d at 352 ("The Loft Law . . . is to be liberally construed to spread its beneficial effects as widely as possible." (internal citations omitted)).

Accordingly, the Court rejects Jo-Fra's "plain meaning" argument. Instead, it finds that the Board's interpretation of 29 RCNY § 1-06.1(c) was reasonable and rational.

In the alternative, Jo-Fra argues that even if the Board properly interpreted the provision, its decision was nevertheless arbitrary and capricious. Petitioner's Memorandum of Law at 15 - 17. It contends that the Board's decision was not rationally based because it determined the

overcharge amount from the date of the filing of a Coverage Application that was withdrawn. When the Tenants withdrew their Coverage Application, it argues, the application was terminated and was rendered a nullity, no longer conferring legal rights to the Tenants. Instead, it argues that its October 1, 2007 Registration Application "substituted for and superceded the withdrawn Coverage Application as the basis for coverage and the parties' rights and obligations under the Loft Law."[2] Petitioner's Memorandum of Law at 16. Therefore, Jo-Fra contends that it was unreasonable for the Board to rely upon the Coverage Application to determine overcharges. To make this argument, Jo-Fra relies heavily on case law concerning the legal effect of withdrawal of pleadings.

This argument is unpersuasive. It is not for the Court to second guess the Board's finding or substitute it's own judgment if the decision is consistent with a rule and contains a rational basis. *See Nur Ashki Jerrahi Community v. New York City Loft Bd.*, 80 A.D.3d 323, 331 (1st Dept. 2010) ; *902 Assoc.*, 229 A.D. at 352; *Bear v. New York City Loft Board*, 202 A.D.2d 260 (1st Dept. 1994); *Tommy & Tina, Inc. v. Consumer Affairs of City of N.Y.*, 95 A.D.2d 724 (1st Dept. 1983). Clearly, this is the case here. The Board based its decision not on the legal validity of the withdrawn application as Jo-Fra argues. Rather, it emphasized that "[t]he rule does not distinguish" between an application that ultimately confers coverage and one that is withdrawn. It noted that "withdrawal of the coverage applications has no bearing on the Tenants' overcharge

[2]Jo-Fra also unconvincingly argues that Judge Schlesinger's decision that Jo-Fra's Registration Application and not the Tenants' Coverage Application was the basis of coverage, supports its argument that overcharges must be calculated from the date of the Registration Application. However, in her decision, Judge Schlesinger explicitly noted that she "takes no position whatsoever as to overcharging" and that the coverage issue "has nothing to do with this Article 78 or with my decision." Verified Answer Exhibit R.

applications." Verified Answer Exhibit Z at 3. Under this interpretation of the rule, it is not the validity of the application or its final disposition but the **date it was filed** which is important because its function is to provide notice of possible liability to the landlord. Therefore, the cases Jo-Fra relies on regarding withdrawal of pleadings are inapposite as the legal effect of the coverage applications is irrelevant here.

Consistent with this reading of 29 RCNY § 1-06.1(c), the Board found that the **filing date** of the Tenants' Coverage Application in August 2004 was the date that should be used to calculate overcharges because when the Tenants filed their applications they put Jo-Fra on notice of its potential liability. If Jo-Fra then chose, as it did, to continue to charge the Tenants' rents that exceeded the maximum permissible under the Loft Board rules after that date, it assumed the risk of liability.

The Board's decision was rationally based and was consistent with its interpretation of the rule. Therefore, the decision was neither arbitrary nor capricious.

In accordance with the foregoing, it is

ADJUDGED that the petition is dismissed.

J.S.C.

Dated: New York, New York
September 23, 2011