Matter of Kobrick v New York State Div. of Hous. & Community Renewal
2014 NY Slip Op 30096(U)
January 13, 2014
Sup Ct, New York County
Docket Number: 102267/13
Judge: Jr., Alexander W. Hunter
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR. PART 33

Justice

Index Number : 102267/2012
KOBRICK, STEVEN
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 90, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-44

Answering Affidavits — Exhibits _____ | No(s). 45-67; 68-75

Replying Affidavits _____ | No(s). 76-90

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the order and judgment annexed hereto.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/13/14

_____, J.S.C.

ALEXANDER W. HUNTER JR.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

----------X

In the Matter of the Application of
Steven Kobrick and Gary Schwedock,

Index No.: 102267/13

Petitioners,

Order and Judgment

-against-

New York State Division of Housing and Community Renewal and Sherwood 34 Associates,

Respondents.

----------X

HON. ALEXANDER W. HUNTER, JR.

Two separate applications were filed in this action under motion sequences #1 and #4. Both applications will be decided herein.

The application of petitioners for an order pursuant to CPLR Article 78, annulling the January 27, 2012 "Order and Opinion Granting Petition for Administrative Review After Court Remit" (the "January 27, 2012 Order and Opinion") and remanding the matter back to respondent New York State Division of Housing and Community Renewal ("DHCR") for further proceedings, is denied and the proceeding is dismissed without costs and disbursements.

The application of movant George David McCune to intervene as a petitioner in the instant Article 78 proceeding is denied.

The instant proceeding arises from a long running dispute between petitioners and respondents concerning whether the housing accommodation located at 447 Tenth Avenue, New York, NY (the "subject building") and the adjacent building located at 449 Tenth Avenue a/k/a 500 West 34th Street (the "subject adjacent building") (collectively, the "subject buildings") form a horizontal multiple dwelling ("HMD"). An HMD is defined as two or more separate buildings that share certain sufficiently integrated common elements to consist of six or more residential units. Section 2520.11 of the Rent Stabilization Code exempts buildings with fewer than six units from rent stabilization. Standing alone, the subject building contains less than six residential units.

A 1987 DHCR order determined that the subject building formed an HMD with the subject adjacent building. No factual findings were included in the order. In a conflicting 1988 order, DHCR determined that the subject buildings did not form an HMD. Respondent, owner/landlord Sherwood 34 Associates ("Sherwood") commenced a proceeding in 2000 to resolve the conflict between the orders. In 2000, DHCR upheld the rent-stabilized status of the subject building on the ground of *res judicata*. Sherwood filed a petition for administrative

review ("PAR"), which was denied on November 14, 2001.

Sherwood commenced an Article 78 proceeding challenging the denial. DHCR filed a cross-motion for an order remanding the matter for further fact-finding and a new determination. Petitioners herein opposed the petition and cross-motion and sought an order affirming the November 14, 2001 order. The application of Sherwood was denied on the ground of *res judicata* and the cross-motion of DHCR for remand was denied.

Sherwood and DHCR appealed the denial of the Article 78 petition and cross-motion for remand. The First Department determined that application of the doctrine of *res judicata* was not appropriate, as each order could have a preclusive effect and the record before DHCR was insufficient to show how it reached the conflicting result. The First Department remanded the proceeding back to DHCR to determine, among other things, whether the regulatory status should be based upon evidence of the operations of the buildings in 1987, or based upon evidence of how the buildings currently operated.

DHCR reopened the proceeding at the administrative appeal level. The parties submitted extensive documentation relating to the configuration and operations of the subject buildings. An inspection was conducted of the subject buildings. The inspection report was referenced in the October 4, 2007 DHCR order that determined that the subject buildings formed an HMD.

Sherwood commenced an Article 78 proceeding challenging the impartiality and fairness of the inspector and the manner in which the inspector conducted the inspection. By order dated November 21, 2008, the Hon. Lewis Bart Stone remanded the proceeding back to DHCR for a re-inspection by a different inspector and for DHCR to provide detailed factual findings (the "remand order").

DHCR opened a new administrative review proceeding concerning the re-inspection of the subject buildings. An emergency inspection of the subject building was conducted on September 8, 2010, in response to correspondence from petitioners alleging imminent actions by Sherwood to destroy or alter existing evidence of building systems at the subject building. Sherwood argued that the emergency inspection was tainted by the ex parte communications of petitioners with the inspector. The emergency inspection report yielded an equivocal finding, which neither proved nor disproved the allegations of tampering and destruction by Sherwood. The emergency inspection report was not utilized as a basis for the evaluation of the HMD issue by DHCR.

The court-ordered inspection was conducted on October 13, 2010. The October 13, 2010 inspection report was relied upon solely for the purpose of evaluating the HMD issue by DHCR. After considering the expansive submissions by the parties, DHCR rendered its determination. DHCR determined that the subject buildings did not form an HMD and thus were not subject to rent stabilization. DHCR found that the indicia of commonality were outweighed by the indicia of separateness.

With respect to the indicia of commonality, DHCR determined that the subject buildings were commonly owned and managed from 1954 to the present time; shared a common commercial tenant; shared identical linoleum flooring in the stairwells; shared mutual access to the roofs; shared heat and hot water; shared a Time Warner cable television box; shared a telephone junction box; and shared trash receptacles. DHCR afforded some of the above factors of commonality little weight. The commonality as to the cable television apparatus and the telephone junction box were not found to be relevant to the issue of HMD status because the systems were installed by commercial third parties and not by Sherwood. There was commonality in the fresh water intake system until 2005, when Sherwood installed separate water mains and metering to each of the subject buildings.

With respect to the indicia of separateness, DHCR determined that each of the subject buildings: was erected separately; has its own multiple dwelling registration number; has its own New York City tax lot number; is assessed separately for the calculation of real estate taxes; has its own meets and bounds description; and is separately billed for water and sewer, electricity, and natural gas. The inspection report established that the subject buildings lacked similarity with respect to overall design, appearance, and configuration. Evidence further established the existence of separate and/or independent building systems.

Petitioners contended, among other things, that the inspection report was incomplete and should have been supplemented with additional information. Petitioners urged DHCR to conduct additional case processing by way of another limited re-inspection of the subject buildings or a full evidentiary hearing which would serve to identify and resolve the contested issues. DHCR concluded that there was no need to re-inspect the subject buildings or conduct a full evidentiary hearing, as the issue to be resolved rested entirely upon factual findings surrounding the physical attributes, appearance, operations, and ownership of the subject buildings. DHCR also concluded that the inspection entailed a comprehensive review of the essential conditions and that the records were sufficient to enable a fair determination of the question of HMD status.

Petitioners aver that the matter should be remanded on the following grounds: (1) DHCR did not properly weigh the evidence and factors of commonality and separateness; (2) DHCR failed to conduct a hearing despite repeated requests; and (3) the inspector failed to follow the guidelines set forth in the remand order and the rules of DHCR when conducting the inspection and ultimately reaching his decision.

In opposition, DHCR avers that: (1) the January 27, 2012 Order and Opinion was rational and in full accord with all applicable laws and the remand order; (2) HMD cases present various combinations of factors of commonality and no single factor is dispositive; (3) its proceedings in this matter have not violated the due process rights of petitioners.

In opposition, Sherwood avers that the factual findings in the January 27, 2012 Order and Opinion are supported by evidence in the record and the procedural challenges raised by petitioners do not render the January 27, 2012 Order and Opinion arbitrary or capricious.

In reply, petitioners aver that: (1) Sherwood bears the burden of proving that the subject buildings do not form an HMD; (2) it was error to base the determination on conditions as they existed during the inspection in 2010; (3) undisputed factors of commonality predominate over limited factors of separateness; (4) disputed facts were arbitrarily resolved in favor of the landlord without consideration of additional evidence; and (5) due process required a hearing to be held before depriving petitioners of their rent-stabilized status.

In reviewing an administrative agency determination, the court must ascertain whether there is a rational basis for the agency action or whether it is arbitrary and capricious. **See Matter of Gilman v. N.Y. State Div. of Hous. & Cmty. Renewal, 99 N.Y.2d 144, 149 (2002) (citation omitted)**. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. **See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974)**. If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. **Id**. Further, courts must defer to the rational interpretation by an administrative agency of its own regulations in its area of expertise. **See Salvati v. Eimicke, 72 N.Y.2d 784 (1988)**. The function of the court is exhausted when there is a rational basis for the conclusion reached...." **Bambeck v. State Div. of Hous. & Cmty. Renewal, Office of Rent Admin., 129 A.D.2d 51, 55 (1st Dept. 1987)**.

"In determining the existence of a regulated horizontal multiple dwelling the crucial factor...is...[that] there are sufficient indicia of common facilities, common ownership, management and operation to warrant treating the housing as an integrated unit and multiple dwelling subject to regulation." **Salvati v. Eimicke, 72 N.Y.2d 784, 792 (1988) (citation omitted)**. Cases present various combinations of these factors and no single factor is dispositive. **Love Sec. Corp. v. Berman, 38 A.D.2d 169, 170 (1st Dept. 1972)**. The satisfaction of one or more elements of the test does not necessarily compel a finding of integration. Absent structural or mechanical commonality, a shared heating system is insufficient to establish an HMD. **See Salvati, 72 N.Y.2d at 792; Jackson v. Biderman, 151 A.D.2d 400 (1st Dept. 1989)**. Moreover, common ownership is not determinative to establish that separate buildings constitute an HMD. **See O'Reilly v. N.Y. State Div. of Hous. & Cmty. Renewal, 291 A.D.2d 252 (1st Dept. 2002)**. "Where there are divergent factors which might well lead to different conclusions, the initial decision is for the respondent Rent Administrator, and his determination, unless arbitrary, is final." **Bambeck v. State Div. of Hous. & Cmty. Renewal, Office of Rent Admin., 129 A.D.2d 51, 55 (1st Dept. 1987)**.

The presence of several enumerated factors shows that there is a rational basis for the determination contained in the January 27, 2012 Order and Opinion, and, as such, it should not be disturbed. Notwithstanding the fact that there are common features, including common ownership and management, a common commercial tenant, and common heating and hot water, there are sufficient separate characteristics present to support the administrative determination as rational. The subject buildings: were erected separately; maintain separate multiple dwelling registration numbers; maintain separate tax lot numbers; are assessed separately for the

calculation of real estate taxes; are deeded separately, each with its own meets and bounds description; and are billed separately for water and sewer, electricity, and natural gas. Furthermore, the subject buildings lack similarity with respect to overall design, appearance, and configuration and evidence further establishes the existence of separate and/or independent building systems. This court finds no reason to interfere with the determination that the subject buildings do not comprise an HMD. Accordingly, the January 27, 2012 Order and Opinion is sustained.

DHCR is not mandated to hold a hearing, and may determine the issues on the bases of written submissions of the parties. **Bauer v. N.Y. State Div. of Hous. & Cmty. Renewal, 225 A.D.2d 410 (1st Dept. 1996)**. "[A]ll that due process requires is that reasonable notice be afforded to the parties to a proceeding and that they have an opportunity to present their objection." **Richter v. N.Y. State Div. of Hous. & Cmty. Renewal, 204 A.D.2d 648 (2nd Dept. 1994); Rubin v. Eimicke, 150 A.D.2d 697, 698 (2nd Dept. 1989)**.

Movant George David McCune is a senior citizen who has been the rent-controlled tenant for 43 years of apartment 4F in the subject adjacent building. Movant seeks to intervene in the instant proceeding.

Movant avers that the January 27, 2012 Order and Opinion directly affects his rights as a long-time rent-controlled tenant of the subject adjacent building and it was erroneous and unlawful for DHCR to render a determination without adding movant as a party to the proceeding. Movant avers that the determination directly affects: (1) whether he can continue to reside in his apartment as a rent-controlled tenant; (2) whether Sherwood will be able to obtain permission to demolish the subject building and evict movant in doing so; and (3) the amount his rent could be increased in the event of a major capital improvement ("MCI") rent increase. Movant maintains that he should be allowed to participate in the proceeding beginning at the administrative level.

Respondents oppose the application of movant on the grounds that: (1) the application is barred by the statute of limitations; (2) the application is barred by the doctrine of laches; and (3) movant lacks standing to challenge whether the subject building is subject to rent stabilization, as movant is rent-controlled.

Petitioners do not oppose the application to intervene and have no objection to the relief sought by movant.

In reply, movant avers that: (1) the instant Article 78 proceeding was commenced within the proscribed time period and that the statute of limitations did not begin to run until movant learned that he was "aggrieved;" (2) his claim is closely related to the claims of petitioners, which makes movant a necessary party; (3) allowing movant to intervene does not prejudice respondents; (4) movant has standing and actual injury, as removing the rent-controlled tenancy of movant will make it easier for Sherwood to obtain a certificate of eviction for demolition,

which will allow Sherwood to impose significantly higher rent increases upon movant; (5) the doctrine of laches is inapplicable, as DHCR should have noticed movant of its findings upon its issuance of the January 27, 2012 Order and Opinion and Sherwood has unclean hands.

"The two-part test for determining standing is a familiar one. First, a plaintiff must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." **N.Y. State Assn. of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004)**. A party that is not adversely affected by a DHCR determination does not have standing to challenge whether the determination has a rational basis. **Heilweil v. N.Y. State Div. of Hous. & Cmty. Renewal, 12 A.D.3d 300 (1st Dept. 2004)**.

Here, movant has failed to satisfy both the "injury in fact" and "zone of interest" prongs of the test to establish standing. The claims that Sherwood may, in the future, increase the rent of movant as a result a MCI or demolish the subject adjacent building is too speculative to give rise to a cognizable interest. Moreover, the movant is not within the "zone of interest" as his rights inure to him under rent control laws and not rent stabilization laws. **See Felner v. Office of Rent Control, 27 N.Y.2d 692 (1970)**. Although the January 27, 2012 Order and Opinion determined that the housing accommodation of petitioners is not subject to rent stabilization, the determination did not affect the rent-controlled status of movant. Accordingly, movant does not have standing to maintain this proceeding.

Accordingly, it is hereby

ADJUDGED that the application of petitioners for an order annulling the January 27, 2012 Order and Opinion and remanding the matter back to DHCR for further proceedings, is denied and the proceeding is dismissed without costs and disbursements. The application of movant George David McCune to intervene as a petitioner in the instant Article 78 proceeding is denied.

Dated: January 13, 2014

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR.