Matter of Fortoso v State of New York Div. of Hous. & Community Renewal
2015 NY Slip Op 31895(U)
September 18, 2015
Supreme Court, Bronx County
Docket Number: 260379/2015
Judge: Jr., Kenneth L. Thompson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
In the Matter of the Application of:

Index No: **260379/2015**

LIDIA FORTOSO and MANUEL FORTOSO

Petitioners,

DECISION AND ORDER

For a Determination Pursuant to Article 78 of the Civil Practice Law and Rules,

Present:
HON. KENNETH L. THOMPSON, JR.

-against-

THE STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent. X

The following papers numbered 1 to **10** read on this **Article 78**

No On Calendar of **July 10, 2015**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1, 9**
Answering Affidavit and Exhibits	**4, 10**
Replying Affidavit and Exhibits	**8**
Affidavit	
Pleadings -- Exhibit	**6a**
Memorandum of Law	**5**
Stipulation -- Referee's Report --Minutes	**6, 7**
Filed papers	**2, 3**

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

In this Article 78 Petitioners seek to annul the order of Respondent, The State of New York, Division of Housing and Community Renewal, (DHCR), dated March 4, 2015, as arbitrary, capricious and contrary to law, and to grant Petitioners' Petition for a rent overcharge and failure to provide a lease renewal or in the alternative, remanding the matter to DHCR for further proceedings. Proposed respondent-intervenor, Sunan Musovic, (Musovic), moves pursuant to CPLR 1013 and 7802(d) to intervene in this proceeding, as Musovic is the owner of the subject residential premises, and moves to amend the caption, interpose a pre-answer motion to dismiss, dismissing the Petition pursuant to CPLR 3211(a)(10) and 7804(f) for failure to name a necessary party, and dismiss the Petition pursuant to CPLR 3211(a)(7), for failure to state a claim under Article 78. The Article 78 Petition and Musovic's motion to intervene are hereby consolidated for decision and disposition.

In 1984, Petitioners moved into a one-bedroom rent stabilized apartment in a seven unit multiple dwelling, (front building), that was built in 1906. In 1995, petitioners moved to a separate two-family house to the rear of the original building, (rear building), that was built in 1901. Had the move been at Musovic's request, Petitioners would be entitled to a monthly rent governed by the rent stabilization laws

A prior Article 78 brought by Musovic to overturn the decision of DHCR, finding that the rear building was rent stabilized was settled by a stipulation dated November 30, 2012, that remanded the proceeding back to DHCR for further processing and order. The issue of whether Petitioners moved from the front building to the rear building at Petitioners' or the Musovic's request was heard before an Administrative Law Judge. After a hearing, it was determined that Petitioners move to the rear building at the request of Petitioners and to accommodate Petitioners growing family. The relocation determination is not challenged in Petitioners papers before this Court. If the relocation determination were challenged in this Petition, this Article 78 would have to be transferred to the Appellate Division. (CPLR 7804[g]). However, at issue is whether the rear building is exempt from rent stabilization because it has less than six apartments or is the rear building part of a Horizontal Multiple Dwelling, (HMD), in concert with the front building, which is rent stabilized.

> In determining the existence of a regulated horizontal multiple dwelling, the crucial factor is whether 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 (*Matter of Salvati v Eimicke,* 72 NY2d 784, 792, *rearg denied* 73 NY2d 995). The landlord's expert testified, based on his review of all documents on file at the Buildings Department back to 1903, that, other than a shared heating system, there was no structural or mechanical commonality among the buildings. Shared heating is insufficient to establish a horizontal multiple dwelling (*Salvati v Eimicke, supra; see also, Delorenzo v Krizman,* 125 AD2d 1015). Common ownership is not determinative to establish that separate buildings constitute a

horizontal multiple dwelling (*Matter of Bambeck v State Div. of Hous. & Community Renewal,* 129 AD2d 51, *lv denied* 70 NY2d 615).

O'Reilly v. New York State Div. of Hous. & Cmty. Renewal, 291 A.D.2d 252, 254, 737 N.Y.S.2d 361 (2002)

In the instant Article 78, the front and rear buildings have common ownership, heating system, centrally located mail boxes, same address, common lighting system, and have a common water main and gas connection and all mailboxes were located in the front building. However, the buildings have separate water, gas and electric meters, separate building foundations and no common walls, roofs, basements or chimneys and were built at different times, with different configurations.

Given the large number of factors considered in determining whether there is a HMD, no precedent is likely to be exactly on point on all such factors. Furthermore, given the differences highlighted above, the determination of the Deputy Commissioner rendered in an order and opinion dated March 4, 2015, cannot be said to be arbitrary and capricious nor contrary to law.

With respect to Petitioners' argument that the opposite conclusion reached by the Deputy Commissioner in his March 4, 2015 order and opinion from his June 29, 2012 order and opinion indicates that the March 4, 2015 order and opinion is arbitrary and capricious is an unpersuasive argument. In his decision granting the landlord's Petition for Administrative Review, the March 4, 2015 order and opinion, the Deputy Commissioner cited to **"[a]dditional evidence** supporting the separate nature of the buildings, [including] a November 12, 1914 letter from the New York City Tenement House Department finding that the rear house was separate from the front tenement and evidence that HPD considers only the front building with seven apartments to be a multiple dwelling." (Emphasis added). There was no reference to this additional evidence in the Deputy Commissioner's earlier order and opinion dated June 29, 2012. There is both evidence

and case law to support the PAR decision dated March 4, 2015, rendered by DHCR.

Accordingly, the Petition is dismissed. The motion of the landlord, Sunan Musovic, to intervene is denied as moot.

The foregoing shall constitute the decision and order of the Court.

Dated: SEP 18 2015

KENNETH L. THOMPSON JR. J.S.C.