

<b>Matter of Mid Bronx Realty LLC v Been</b>
2015 NY Slip Op 31896(U)
September 10, 2015
Supreme Court, Bronx County
Docket Number: 260873/2014
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

**Application of MID BRONX REALTY LLC,**

INDEX NUMBER: **260873/2014**

Petitioner,

Present:  
**HON. ALISON Y. TUITT**  
*Justice*

**For a Judgment Pursuant to N.Y. C.P.L.R.  
Article 78**

**-against-**

**VICKI BEEN as Commissioner NEW YORK  
CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT of and  
the NEW YORK CITY DEPARTMENT OF  
HOUSING PRESERVATION AND DEVELOPMENT,**

**and**

**JACQUES JUHA as Commissioner of the  
NEW YORK CITY DEPARTMENT OF FINANCE  
and the NEW YORK CITY DEPARTMENT OF  
FINANCE,**

**RICK D. CHANDLER, as Commissioner of the  
NEW YORK CITY DEPARTMENT OF  
BUILDINGS and the NEW YORK CITY DEPARTMENT  
OF BUILDINGS,**

Respondent(s).

The following papers numbered 1-2,

Read on this Article 78 Petition

On Calendar of 3/16/15

Notice of Petition-Exhibits and Affirmation \_\_\_\_\_ 1

Verified Answer and Respondent's Memorandum of Law in Opposition \_\_\_\_\_ 2

Upon the foregoing papers, the Article 78 Petition is granted for the reasons set forth herein.

✓ Petitioner brings the instant Petition pursuant to Article 78 of the C.P.L.R. seeking an order reversing the determination made by Respondent Department of Housing Preservation and Development (hereinafter "HPD") to order emergency repairs and charge petitioner \$25,454.65 for such repairs which allegedly occurred on or about January 13, 2014 and declaring this determination to be arbitrary and capricious and an abuse of discretion and in violation of HPD procedures, and due process of law under the United States Constitution and New York State Constitution; Reversing the determination made by Respondent, HPD, denying Petitioner's request for an opportunity to protest emergency repair charges and declaring this determination to be arbitrary and capricious and an abuse of discretion and in violation of HPD procedures, and due process of law under the United States Constitution and New York State Constitution; Directing Respondent HPD to provide Petitioner an opportunity to protest emergency repair charges or an informal hearing to protest the determination of such charges; Reversing the determination made by Respondent New York City Department of Finance (hereinafter "DOF") to enforce a HPD charge of \$25,454,65 as a tax lien on Petitioner's real property, vacating the tax lien and declaring this determination to be arbitrary and capricious and an abuse of discretion and violation of DOF procedures, and due process of law under the United States Constitution and New York State Constitution; Issuing an order permanently enjoining DOF from enforcing the charge as a tax lien on Petitioner's real property, and; Awarding costs and disbursements of this proceeding, and granting such other and further relief as the Court deems proper.

Petitioner Mid Bronx Realty LLC (hereinafter "Mid Bronx") is the owner of the property at issue located at 10 West 172<sup>nd</sup> Street, Bronx, New York a/k/a 1491 Jerome Ave, Bronx, New York and has its principal place of business in Bronx, County. Respondent HPD is a governmental body with offices in the State of New York, County of New York and Respondent Vicki Been is the Commissioner of HPD. Respondent DOF is a governmental body and has offices in the State of New York, County of New York and Respondent Jacques Jiha is the Commissioner of DOF. Respondent New York City Department of Buildings (hereinafter "DOB") is a governmental body located in New York, New York and Respondent Rick D. Chandler is the Commissioner of DOB.

Petitioner alleges that on or about January 3, 2014, the DOB issued violation # 035080941M to Mid Bronx for the Subject Premises citing a "failure to maintain bldg in code- compliant manner." On or about

January 10, 2014 Mid Bronx received an Immediate Emergency Declaration notice dated January 7, 2014 issued by the DOB and an Urgent Notice dated January 8, 2014 issued by the HPD-Demolition Unit. The Emergency Declaration recommended providing approximately 110 feet of sidewalk shed along West 172<sup>nd</sup> Street, and addressed bulging and cracked masonry deficiencies at the building parapet<sup>s</sup> which were in need of repair. The Urgent Notice requested that the condition referred to in the Declaration be cured immediately and that DOB approval must be obtained to commence the emergency repairs. The Urgent Notice specifically advised Mid Bronx that it had to contact DOB to obtain their approval to address the emergency condition. Petitioner states that, upon information and belief, Mid Bronx received the notices at the end of the day on Friday, January 10, 2014 and in fact did contact DOB to obtain their approval for the emergency repair as required in the Urgent Notice. When Mid Bronx received the referenced notices, it immediately retained an architect to conduct the emergency repairs. Domenico Antonelli of B-Cubed Engineering LLC timely contacted DOB Borough Commissioner Werner Defoe on or about Monday, January 13, 2014, to inform him that Mid Bronx would immediately cure the deficiencies. Mr. Antonelli followed the telephone communication with an email and letter dated January 14, 2014 which notified the DOB in writing that his firm was filing drawings for the structural repairs with DOB and would install a sidewalk shed at the Subject Premises. Petitioner annexes a copy of the email and letter. Mid Bronx arranged for Everest Scaffolding to erect a sidewalk shed at the subject premises the next day on or about January 14, 2014. However, when the scaffolding company arrived at the premises, it was discovered that a sidewalk shed had already been erected by HPD. Mid Bronx's architect immediately emailed Mr. Defoe again and advised him that Petitioner had complied with the notices and contacted DOB timely and that the sidewalk shed placed by HPD should be removed and replaced by Mid Bronx. Mr. Defoe did not respond. Petitioner annexed Mr. Antonelli's ~~a~~ copy of the follow-up email.

Petitioner argues that pursuant to the notice received from DOB, Petitioner was only required to contact and notify DOB that it will commence to cure the violation on its own and to obtain permission from the DOB to proceed with repairs, with which as demonstrated above, Mid Bronx had complied. In fact, there was no specific time frame referenced in the notices as to when the repairs must begin or be completed. Nonetheless, argues Petitioner, it had Everest Scaffolding at the subject premises on January 14, 2014 to install the scaffolding within days of Petitioner's receipt of the Urgent Notice and Emergency Declaration. Petitioner further argues that it had moved expeditiously to notify the DOB as required by the notice, hire<sup>d</sup> an architect and

✓ scaffolding company, file plans for approval with the DOB and commence the actual installation of the scaffolding. Petitioner argues that despite its impressive efforts to comply with the emergency notices, HPD wrongly erected the sidewalk shed, disregarding the fact that Petitioner notified DOB Borough Commissioner Werner Defoe by telephone, email and letter communication to obtain approval for the emergency cure of the condition. Additionally, although the Urgent Notice provides Petitioner the option to correct the emergency condition on its own by obtaining approval from DOB, the notice makes that option impossible to accomplish by stating that "unless HPD is notified by the Department of Buildings within three business days from the date of this notification, HPD will proceed to cure the emergency condition". Petitioner questions how the Urgent Notice can condition any cure on Petitioner, insuring that one government agency (i.e., DOB) notifies another agency (i.e., HPD) within three business days. Petitioner argues that it <sup>did</sup> not in control of either agency, and that such a condition is not only arbitrary and capricious, but also an unfair request and an abuse of discretion. Petitioner also argues that the requirement that DOB notify HPD within three business days from the date of the notice is not feasible. The Urgent Notice sets an time frame that is not achievable because by the time the Petitioner receives the notice dated January 8, 2014 by regular mail on January 10, 2014, it does not have three business days to then obtain DOB approval and ensure that DOB contacts HPD.

Upon reviewing its property tax statement, Petitioner discovered that on or about June 20, 2014, a charge was added to the taxes for the emergency repair conducted by HPD in the amount of \$25,454.65. Petitioner argues that the individual charge of \$25,454.65 for the erection of a sidewalk shed is grossly excessive and wholly disproportionate to the work that needed to be performed. Petitioner argues that this unfair and excessive charge and penalty should be waived and/or reversed or removed in its entirety. A comparable estimate was procured by Petitioner on or about January 14, 2014 for the same work, to install and remove a sidewalk shed at the subject premises specified as 110ft of 8ft at a cost of \$7,061.28. HPD contracted for the same exact work for more than three times the cost. Petitioner annexes a copy of the scaffold installation estimate. Petitioner contends that under such unfair circumstances where Petitioner's option to cure is made impossible even though it followed the appropriate procedure to inform the DOB, the determination of the emergency repair fee of \$25,454.65 and enforcement thereof by tax lien should be reversed because it was arbitrary and capricious and an abuse of discretion. Petitioner never received notice of an emergency repair charge nor was Petitioner given ample time or information to protest any such charge for alleged services.

In opposition, Respondents allege that on January 3, 2014, DOB Inspector Fonseca inspected the subject premises and observed the emergency conditions and issued the subject violation. On January 7, 2014, Inspector Fonseca again inspected the subject premises and, given the hazardous conditions, issued an Immediate Emergency Declaration setting forth that a brick masonry parapet wall had various cracks and bulging, and also setting forth the remedy of providing approximately 110 feet of sidewalk shed to provide protection to pedestrian traffic below. By letter dated January 7, 2014, DOB informed Petitioner and on January 8, 2014, DOB forwarded the Immediate Emergency Declaration to HPD, requesting that it remedy the conditions at the subject premises. Respondents claim that HPD attempted to verbally notify Petitioner of the Immediate Emergency Declaration by phone around 10:30 a.m., however, it was unable to do so because no one answered the phone and the voice mail box was full. By Urgent Notice dated January 8, 2014, HPD also informed Petitioner of the Immediate Emergency Declaration and mailed it to Petitioner. On January 9, 2014, HPD retain Innovative Construction & Management Co., Inc. (hereinafter "Innovative Construction") to erect a sidewalk shed at the premises. By Notice to Proceed Immediate Emergency Work dated January 13, 2014, HPD notified Innovative Construction that it was authorized to perform the emergency work and on January 13, 2014, Innovative Construction erected a sidewalk shed at the subject premises. Respondents state that on January 14, 2014, it received Petitioner's request to erect the sidewalk shed and the DOB Borough Commissioner informed Petitioner that the work had already been completed by HPD. On or around January 21, 2014, Innovative Construction submitted an invoice to HPD for \$17,348, for the work performed at the subject premises. Upon an HPD audit, HPD reduced the invoiced amounts. Thereafter, HPD approved the emergency work charge and forwarded the billing information to DOF for collection. DOF, in turn, billed Petitioner a total of \$25,454.65; \$17,098.00 for the billed work by Innovative Construction, \$1,517.45 for the applicable sales tax, and \$6,839.20 for the administrative fees. These charges appeared for the first time on Petitioner's August 22, 2014 Statement of Account. Petitioner submitted a timely protest, dated October 6, 2014, claiming that it had attempted to remedy the situation as stated in the Immediate Emergency Declaration but the work had been completed by the time it acted and that the costs billed to it for the work were excessive. By letters dated October 8, 2014, HPD denied Petitioner's protest stating that the Emergency Repair Bureau followed proper procedure and the charges are proper.

Respondents argue that HPD's determination to deny Petitioner's protest to the emergency work

charges and uphold the charges was reasonable and rational and in all respects conforms with the applicable statutes, laws and regulations.

Article 78 provides for limited judicial review of administrative actions. Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. Section 7803 provides in relevant part that “[t]he only questions that may be raised in a proceeding under this article are... (3) whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.”

In deciding whether an agency’s determination was supported by substantial evidence or was arbitrary, capricious or an abuse of discretion, the reviewing court is limited to assessing whether the agency had a rational basis for its determination and may overturn the agency’s decision only if the record reveals that the agency acted without having a rational basis for its decision. See, Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) citing Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974); Sullivan County Harness Racing Association v. Glasser, 30 N.Y.2d 269, 277 (1972). Substantial evidence is more than “bare surmise, conjecture, speculation or rumor” and “less than a preponderance of the evidence.” 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176, 180 (1978). Substantial evidence consists of “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” Id. See, also Consolidated Edison v. New York State DHR, 77 N.Y.2d 411, 417 (1991). Where the Court finds the agency’s determination is “supported by facts or reasonable inference that can be drawn from the record and has a rational basis in the law it must be confirmed.” American Telephone and Telegraph Co. v. State Tax Commissioner, 61 N.Y.2d 393, 400 (1984). The arbitrary and capricious test “chiefly ‘related to whether a particular action should have been taken or is justified... and whether the administrative action is without foundation in fact.’” Pell, supra, quoting 1 N.Y. Jur., Administrative Law, §184, p. 609. The reviewing Court does not examine the facts *de novo* to reach an independent determination. Marsh v. Hanley, 50 A.D.2d 687. Furthermore, a Court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary, unreasonable and an abuse of discretion. Pell, supra. The Court must also defer to



the administrative fact finder's assessment of the evidence and the credibility of the witnesses. Lindenmann v. American Horse Shows Association, 222 A.D.2d 248, 250 (1<sup>st</sup> Dept. 1995) citing Berenhaus v. Ward, 70 N.Y.2d 436, 443 (1987).

Petitioner's Article 78 petition is granted as it has made the requisite showing that 'Respondents determination was not supported by substantial evidence and was arbitrary, capricious or an abuse of discretion. There was no rational basis for Respondents' determination. As argued by Petitioner, on January 10, 2014, Friday, when it received the Immediate Emergency Declaration dated January 7, 2014 and the Urgent Notice dated January 8, 2014, it moved expeditiously to address the issues raised. Petitioner immediately retained the services of a licensed architect, and by Monday, January 13, 2014, the architect contacted DOB's Borough Commissioner and advised that Mid Bronx would immediately cure the deficiencies. On January 14, 2014, the architect advised that his firm was filing drawings for the repairs with DOB and erecting the sidewalk shed, in compliance with the Urgent Notice that specifically required that Petitioner obtain DOB approval prior to remedying the emergency conditions. When Petitioner's contractor arrived on January 14, 2014 to perform the work, it discovered that the sidewalk shed had already been erected. Under these circumstances, Petitioner could not have acted more expeditiously. It did what it was required to do as promptly as possible, especially in light of the fact that it received the notices on a Friday, and by the following business day, Monday, it had retained an expert to address the issues. By Tuesday, it had provided the required information to DOB regarding the repairs and was at the premises to perform the work.

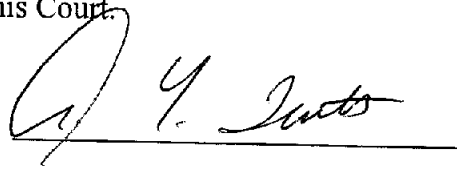
Accordingly, the instant petition is granted to the extent that the determination made by "HPD" to order emergency repairs and charge petitioner \$25,454.65 for such repairs is reversed as it was arbitrary and capricious and the determination made HPD denying Petitioner's request for an opportunity to protest the emergency repair charges is reversed as it was arbitrary and capricious and an abuse of discretion. Respondent HPD is hereby directed to provide Petitioner an opportunity to protest emergency repair charges and provide Petitioner with a hearing in compliance with HPD rules and regulations regarding the determination of such charges. The branch of the Petition seeking to reverse the determination made by Respondent DOF to enforce HPD's charge of \$25,454,65 as a tax lien on Petitioner's real property and vacating the tax lien is granted. DOF is temporarily enjoined from enforcing the charge as a tax lien on Petitioner's real property, pending a hearing by HPD on this matter. Petitioner's application for costs and disbursements of this proceeding is denied at this



junction with leave to renew once a hearing is held on this matter.

This constitutes the decision and Order of this Court.

Dated: 9/10/15

A handwritten signature in black ink, appearing to read "A. Y. Tuitt", is written over a horizontal line.

**Hon. Alison Y. Tuitt**