

**Matter of 264 W. 117th St. Tenant Assn. v New York  
City Dept. of Hous. Preserv. & Dev.**

2018 NY Slip Op 30843(U)

May 4, 2018

Supreme Court, New York County

Docket Number: 452372/2017

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32

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In the Matter of the Application of  
264 West 117<sup>th</sup> STREET TENANT ASSOCIATION,  
ARTHUR BOWENS, SIRA DIOP, PEDRO MARTINEZ,  
and HELEN REYES.

Petitioners,

Index No. 452372/2017  
Motion Seq: 001

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

-against-

DECISION, ORDER & JUDGMENT  
ARLENE P. BLUTH, JSC

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT, and  
MARIA TORRES-SPRINGER, as Commissioner  
of the New York City Department of Housing  
Preservation and Development,

Respondents.

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The petition to annul a determination by respondents that terminated petitioners' tenant interim lease ("TIL") is denied and this proceeding is dismissed.

**Background**

In 2003, petitioner 264 West 117<sup>th</sup> Street Tenant Association ("TA") entered into a TIL with the City of New York in connection with the premises located at 264 West 117<sup>th</sup> Street in Manhattan. The TIL program, run by respondent New York City Department of Housing Preservation and Development ("HPD"), allows tenants to form low-income housing cooperatives and eventually become homeowners. The tenants must follow certain obligations and, in return, HPD renovates the property. If HPD is satisfied that the tenants are properly managing the building, then HPD creates a Housing Development Fund Corporation ("HDFC") in which the tenants acquire the chance to buy shares in the building.

Under TIL guidelines, the TA board has to send in monthly financial reports to HPD by the 15<sup>th</sup> of every month for the previous month's finances. Petitioners failed to send in the reports for July, August, September, October, November and December of 2015 (verified answer, exh F). In January 2016, HPD sent petitioners a letter warning that the building would be issued a Corrective Action Plan ("CAP") if financial reports for November and December 2015 were not turned in by the end of the month (*id.* exh H). In June 2016, the building was issued a CAP for failure to comply with TIL regulations (*id.* exh I).

The CAP contained status updates which warned petitioners that the failure to comply with the CAP's directives would result in termination from the TIL program (*see id.* exh J). On February 24, 2017, HPD informed petitioners that they had failed to comply with the financial reporting and rent collection portions of TIL and directed them to appear for a final compliance review session (*id.* exh K). The meeting was held on April 25, 2017.

On April 27, 2017, HPD sent a termination letter to petitioners (*id.* exh K). With respect to financial reporting, the letter noted that the "last complete report submitted by your TA was December 2015. Based on the last complete report processed by HPD, your TA is not compliant by missing 15 months of reports" (*id.*). HPD added that only Arthur Bowens attended the final compliance review session (*id.*).

HPD applauded "the work and efforts of Mr. Bowens who has been working closely with HPD to bring this TA back in good standing. However, the lack of participation from elected board officers and other tenants has compromised the TA's ability to achieve baseline compliance" (*id.*).

Petitioners dispute the grounds upon which the TIL was terminated. Petitioners claim that regular meetings were held, rents were collected and that HPD's determination was arbitrary and capricious. With respect to the financial reporting problems, petitioners claim that HPD omitted critical information. Petitioners acknowledge that the building failed to submit monthly financial reports in 2016, but claim that HPD lost the paperwork provided by the TA on multiple occasions in 2015 and in 2016.

Respondents insist that the determination was rational and that the TA's inability to comply with basic requirements justified terminating the TA from the TIL program.

#### Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

Here, the Court finds that respondents' determination was rational.<sup>1</sup>

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<sup>1</sup>The Court observes that the respondents' determination was rational to the extent that it was based on the failure to send in financial reports and lack of board participation. With respect to the rent collection issue, petitioners submit a stipulation of settlement for a nonpayment proceeding which acknowledged that the proceeding was filed in error (NYSCEF Doc. No. 10). Petitioners claim that this should not have been part of respondents' determination because it was the only rent arrears issue and respondents do not specifically dispute this contention.

**Financial Reporting**

Petitioners failed to submit timely financial reports for July through December 2015 (verified answer, exh F). And the termination letter, dated April 27, 2017, states that the last financial report for the building was submitted for December 2015 (NYSCEF Doc. No. 9). While this document suggests that the TA eventually turned in financial reports for 2015, it also demonstrates that the TA did not send in any financial reports for 2016. And a letter dated April 28, 2017 from HPD states that the TA had to turn in all financial documents "from January 2016 through May 2017" (verified answer, exh A).

Petitioners do not dispute the fact that they failed to submit timely financial reports. Instead, petitioners blame others. Arthur Bowens, president of the TA, claims that "HPD lost the paperwork the TA turned over on at least 2 occasions in 2015 and another 2 times in 2016. HPD's Mr. Vitaliy lost some of the paperwork and this made it difficult to complete our financial reports. HPD claims that we failed to prepare and submit financial reports for 15 months when in fact HPD employees lost documents which prevented me from preparing them timely" (NYSCEF Doc. No. 5). The Court observes that petitioners worked with the Urban Homesteading Assistance Board ("UHAB"), a tenant advocacy organization that contracts with HPD to help tenants work on compliance issues for the TIL program. Petitioners also blame a UHAB employee for losing paperwork.

Even assuming that UHAB or HPD employees lost paperwork, that does not make respondents' determination arbitrary or capricious. The fact is that it was petitioners' obligation to send in timely reports. And here, the allegations offered about losing paperwork are simply too vague. Petitioners do not allege *what or specifically when* paperwork was lost; petitioners appear

to use this excuse as a catch-all for not submitting any financial reports. Moreover, the fact that UHAB may have lost paperwork does not absolve petitioners of any responsibility. UHAB is there to offer assistance, not to supplant petitioners' role in the TIL program. Petitioners should have kept copies of paperwork given to UHAB or to HPD. After all, the goal of the TIL program is to create an HDFC independently run by the shareholders of a building. The fact that paperwork may have been lost does not excuse the failure to timely submit *any* financial reports for over a year.

### **Participation of Board Members**

Respondents' determination was also rational to the extent it noted that "At this time, your TA has only one active board officer. Mr. Arthur Bowens was the only attendant at this final compliance review session. Insufficient board membership compromises your ability to fully carry out TA responsibilities and functions" (NYSCEF Doc. No. 9).

Petitioner Sira Diop (the secretary) contends that she could not attend the April 25, 2017 review session because of a family emergency (NYSCEF Doc. No. 6, ¶ 11). The treasurer, Pedro Martinez, claims that he was out of the country for the review session (NYSCEF Doc. No. 7, ¶ 11). The problem with these excuses is that it ignores the letters sent by HPD. On February 24, 2017, HPD sent a letter scheduling the final compliance review session (verified answer, exh K). This letter noted that the Board Officers would be contacted to schedule the final compliance review session and that "*Failure to attend this session will result in termination from the TIL program*" (*id.* [emphasis added]).

On March 17, 2017, HPD sent a follow up letter to confirm that the review session was scheduled for April 25, 2017 (*id.*). This letter also stated that "All Board Officers must attend,

failure to comply will result in termination from the TIL Program” and provided contact information if petitioners wanted to reschedule” (*id.*). Despite these clear warnings about the seriousness of the meeting, only Arthur Bowens attended the review session.

In reply, for the first time, Sira Diop claims that she found out about the meeting from Mr. Bowens at the last minute, observes that she did not receive the letter because it was addressed to Leander McFairmont who was no longer the secretary and claims that HPD refused to reschedule the meeting (NYSCEF Doc. No. 26).

The Court cannot consider the new information contained in this affidavit because it was submitted for the first time in reply. There is no reason why Ms. Diop could not have included this information in her affidavit attached to the moving papers. And, even if the Court were to consider the new information, it does not compel a different outcome. Ms. Diop’s affidavit fails to mention when exactly Mr. Bowens told Ms. Diop about the meeting. Obviously, given the clear directives in the letter from HPD, it was imperative that all board members attend. Mr. Bowens can not drag adults to a meeting, and the other board members failed to make attendance a priority.

While, standing alone, Ms. Diop’s absence from the meeting due to a family emergency might not justify a finding of a lack of board participation, the fact is that the treasurer did not attend either. Mr. Martinez states in both of his affidavits that he missed the meeting because he was out of the country (*see* NYSCEF Doc. Nos. 7, 27). But there is no recognition that his attendance was required or that he made any efforts to reschedule given that his attendance was required.

Ultimately, it was up to petitioners, excluding Ms. Reyes who was not a board member, to take HPD's letter seriously and show up for the final review session if they wanted to try to save their status in the TIL program. Instead, only Mr. Bowens attended.

The Court also observes that the record supports respondents' finding that there was a lack of board member participation. Notes from UHAB employees make clear that Mr. Bowens was doing the bulk of the work. During one meeting in December 2015 with Mr. Bowens and a UHAB worker, Mr. Bowens asked for help to do the October financial report. UHAB observed that Mr. Bowens "continues to say that he is not the Treasurer (Mr. Martinez is but he has not been doing the job very diligently). I told Mr. Bowens that he had to take doing the report seriously and attempt to understand how to do it on his own. He agreed to work harder at doing that" (verified answer, exh G).

### **Summary**

The purpose of the TIL program is to prepare tenants for home ownership in an HDFC. The record here indicates that petitioners did not comply with some of the basic requirements of the program and HPD decided to terminate the building from the TIL program. This was not a hasty determination. After months of not submitting financial reports, among other issues, the building was placed in a CAP. Despite this extra attention, petitioners did not comply with the requirements of the TIL program. And when the final compliance review session was scheduled, only one board member showed up despite the fact that HPD had explicitly warned petitioners that the TA would be terminated from the program if all board members did not attend.

Despite petitioners' attempt to highlight problems with HPD's general oversight of the TIL program, that does not change the outcome of the instant proceeding. It does not change the



fact that petitioners did not submit financial reports for over a year or change the fact that only Mr. Bowens attended the final compliance review session. Simply because HPD is not perfect does not mean that its determination here was arbitrary or capricious.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly. Judgment for respondents.

This is the Decision, Order and Judgment of the Court.

Dated: May 4, 2018  
New York, New York



ARLENE P. BLUTH, JSC

**HON. ARLENE P. BLUTH  
J.S.C.**