

Ninth Ave. Realty LLC v City of New York
2018 NY Slip Op 32578(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 160182/2016
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X
NINTH AVENUE REALTY LLC, 137 EAST 29TH & 146 EAST 35TH
LLC, 217 EAST 82ND STREET LLC, SASHA REALTY LLC, 310
EAST 74 LLC, 30 WEST 72 REALTY LLC, 31 CORNELIA STREET
PROPERTIES CORP., 101 PERRY STREET LLC, 190 WAVERLY
PLACE LLC,

INDEX NO. 160182/2016

MOTION DATE 07/03/2018

MOTION SEQ. NO. 001

Petitioners,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION & DEVELOPMENT, MARIA
TORRES-SPRINGER,

DECISION and ORDER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 32, 47, 50, 51, 56,
57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84,
107, 108, 109, 113, 114, 115, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the petition is GRANTED and the
challenged determinations of respondents in these consolidated
proceedings are VACATED and ANNULLED and the applications are
REMANDED to respondents for proceedings in accordance with this
decision.

DECISION

The petitioner-landlords (petitioners) collectively bring
this proceeding challenging respondents' denial of their
respective applications for tax benefits following their
renovations of residential rental properties. The caption

reflects that the proceeding brought under Index No.:
160207/2016 was consolidated with this proceeding by Order of
this court dated June 16, 2017 issued under that index number.

By way of background, the Court has stated that

In New York City, multiple dwellings may qualify for tax incentives designed to encourage rehabilitation and improvements (see Administrative Code of City of NY § 11-243 [previously § J51-2.5]). Specifically, the City's J-51 program, authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years. Eligible projects include moderate and gut rehabilitations; major capital improvements (for example, asbestos abatement or boiler replacement); and conversions of lofts and other nonresidential buildings into multiple dwellings (see Administrative Code § 11-243 [b] [2], [3], [8]; 28 RCNY 5-03 [a]). Rental units in buildings receiving these exemptions and/or abatements must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (see 28 RCNY 5-03 [f]). The Department of Housing Preservation and Development (HPD) administers the J-51 program in the City of New York.

Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 280
(2009).

Petitioners undertook "moderate rehabilitations" (mod
rehab), which the Administrative Code defines as

"a scope of work which (a) includes a building-wide replacement of a major component of one of the following systems: (1) Elevator, (2) Heating, (3) Plumbing, (4) Wiring, [and/or] (5) Window; and (b) has a certified reasonable cost of not less than twenty-five hundred dollars, exclusive of any certified reasonable cost for ordinary repairs, for each dwelling unit in existence at the commencement of the rehabilitation; except that the department of housing

preservation and development may establish a minimum certified reasonable cost to be greater than twenty-five hundred dollars per dwelling unit pursuant to subdivision m of this section."

Administrative Code § 11-243 (a) (2) (6)..

Rules promulgated by respondent HPD provide that mod rehabs are eligible for J-51 benefits (28 RCNY § 5-03 [a][6]), except that "for alterations and improvements commenced after June 15, 1993, the actual assessed valuation of such multiple dwelling, including land, does not exceed an average of forty thousand dollars (\$40,000) per dwelling unit at the time of commencement of construction of the alterations or improvements." 28 RCNY § 5-06 (d) (4) (i) (B). However, the Rules also provide that "the limitations set forth in this paragraph (4) shall not apply to . . . (C) alterations or improvements under § 5-03(a)(6)" (28 RCNY § 5-06 [d] [4] [ii] [C]) that is, mod rehabs.

In justifying their denial of petitioners' applications, respondent HPD argues that Administrative Code § 11-243 (d) (8) (b) (ii) mirrors the actual assessed valuation (AAV) limitation on J-51 benefits for mod rehabs set forth in 28 RCNY § 5-06 (d) (4) (i) (B), without providing any parallel exemption from that requirement as set forth in 28 RCNY § 5-06 (d) (4) (ii) (C).

Although not an argument specifically made on their initial application, the petitioners in their reply briefs argue that

respondents have misapplied the governing section of the Administrative Code based upon its specific statutory language.

The court notes that "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion. Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 (1st Dept 1992). Nevertheless, as the petitioners' argument about the respondents' failure to consider the application of Administrative Code § 11-243 (d)(8)(a)(ii) is similar to the argument originally made in the petitioning brief concerning the application of RPTL 489(11)(a)(2), and as the court at request of the respondents afforded the respondents the opportunity to submit a sur-reply thereto and considered the same, the court shall consider the statutory-based objections of the petitioners.

As stated by the petitioners, Administrative Code § 11-243 (d) (8) (a) (ii) states in pertinent part that the AAV restriction in Administrative Code § 11-243 (d) (8) (b) (ii) does not apply to "alterations or improvements under paragraph five of subdivision b of this section" i.e. "alterations or improvements constituting a moderate rehabilitation." This statutory language is dispositive in this proceeding as the Administrative Code explicitly states, as argued by the petitioners, that the AAV restriction is inapplicable to their

applications and therefore the HPD's determinations were affected by an error of law and must be annulled. CPLR 7803 (3); Guglielmone v Bd. of Educ. of Sayville Union Free School Dist., 253 AD2d 880, 881 (2d Dept 1998).

As the statutory text of the Administrative Code is clear, there is no need to resort to legislative history or administrative guidance as extensively urged in the briefs by both parties.

"Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists. Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute. It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used."

Doctors Council v New York City Employees' Retirement Sys., 71 NY2d 669, 674-75 (1988) (citations omitted).

Here, Administrative Code § 11-243 (d) (8) (a) (ii) clearly states that the AAV limitation does not apply to mod rehabs and therefore respondent's determinations must be reversed and reconsidered.

10/10/2018
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT		