

**Matter of 138 W. 117th Street Tenant Assn. v City of
New York**

2018 NY Slip Op 32801(U)

October 31, 2018

Supreme Court, New York County

Docket Number: 160929/17

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

138 WEST 117TH STREET TENANT ASSOCIATION,
by CLARENCE PARKER, PRESIDENT,
Petitioner,

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

Index No.: 160929/17
DECISION/ORDER

-against-

CITY OF NEW YORK acting by and through its
DEPARTMENT OF HOUSING PRESERVATION
and DEVELOPMENT,

Respondent.
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HON. CAROL R. EDMOND, JSC:

In this Article 78 proceeding, the petitioner 138 West 117th Street Tenant Association (the TA), by Clarence Parker, President (Parker), seeks a judgment to overturn an order of the respondent City of New York (the City), acting by and through its Department of Housing Preservation and Development (HPD), as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied and this proceeding is dismissed.

FACTS

The TA is a non profit organization composed of a number of the tenants of a residential apartment building (the building) located at 138 West 117th Street in the County, City and State of New York. See petition, ¶ 1. The City owns the building, and HPD oversees its operation under the Tenant Interim Lease Program (the TIL Program). *Id.*, ¶¶ 2-5.

The TA manages the building's day to day operations pursuant to a TIL Program net lease

for the property that it executed with the City on November 1, 2000 (the net lease). *See* petition, ¶ 3; exhibit A. Under the TIL Program, a tenants association that successfully manages its building may apply to HPD to assume the building's ownership by converting itself into a Housing Fund Development Corporation (HFDC). *See* Mompont aff in opposition, ¶¶ 4-10. HPD is charged with overseeing tenants associations' compliance with governing TIL Program rules. *Id.* In this role, HPD approves the applications of successful tenants associations which wish to become HFDCs, and terminates the net leases of tenants associations which fail to comply with the aforementioned rules. *Id.*

Here, HPD determined that the TA had repeatedly failed to comply with numerous TIL Program management rules, including those pertaining to rent collection and the filing of periodic financial reports. *See* Mompont aff in opposition, ¶¶ 11-17. As a result, on June 21, 2016, HPD sent the TA a letter informing it that HPD would place the TA on a six-month "corrective action plan" if the TA did not fully comply with these rules by the month's end. *Id.*; exhibit D. The TA failed to do so, and the ensuing "corrective action plan" ran from July 1, 2016 through December 31, 2016. *Id.*, ¶¶ 18-19; exhibit E. During that time, the TA evidently provided HPD with some, but not all of the outstanding reports and documentation. *Id.*, ¶ 23. HPD sent the TA a status update letter on October 28, 2016, and a deficiency notice on November 4, 2016, both of which described the deficiencies that the TA had yet to remedy. *Id.*, ¶¶ 23-26; exhibits F, G. HPD sent the TA a final status update letter on March 6, 2017, after the "corrective action plan" had expired, that delineated all of the instances of the TA's non-compliance during the plan period. *Id.*, ¶ 27; exhibit H. Thereafter, on August 9, 2017 HPD sent the TA a termination notice (the termination notice) that formally ended the TA's participation in

the TIL Program, and also served as a 30-day notice to terminate the net lease. *Id.*, ¶¶ 29-33; exhibit I. The termination notice states, in relevant part, as follows:

“On June 21, 2016, your Tenant Association (‘TA’) was assigned a Corrective Action Plan (‘CAP’) for the period July 1, 2016 through December 21, 2016. The CAP identified a set of deliverables that were due to HPD by December 31, 2016. As of today, the deliverables were not satisfied.

“In addition, you were notified in a letter dated March 6, 2017 that you failed to comply with the requirements of the [TIL Program], and you were required to attend a compliance review session at HPD with all the TA Board Officers. Your TA has since failed to respond to HPD’s telephone calls and emails to schedule a final compliance review session.

“As such, HPD is terminating your enrollment in the TIL Program effective October 1, 2017.

* * *

“This letter serves as a 30-day notice to terminate the net lease between HPD and your TA. You may seek judicial review of this determination pursuant to Article 78 of the CPLR.”

Id., exhibit I. The “receivables” referred to in the termination letter included: 1) “management fees”; 2) “monthly meeting/minutes/attendance”; 3) “financial reporting”; and 4) “rent collection.” *Id.* The termination letter stated that the TA’s production of each of these four classes of “receivables” was “incomplete.” *Id.* Thereafter, on December 7, 2017, the TA commenced this Article 78 proceeding to overturn HPD’s decision to terminate its net lease and its participation in the TIL Program. *See* petition. The City and HPD filed a joint answer to the TA’s petition on March 12, 2018. *See* verified answer. The matter is now before the court (motion sequence number 001).

DISCUSSION

The court’s role in an Article 78 proceeding is to determine, upon the facts before the

administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. See *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is arbitrary and capricious if it is “without sound basis in reason, and in disregard of the facts. . . .” See *Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Here, the counsel for the TA argues that HPD’s termination decision was arbitrary and capricious because: 1) the TA did not receive HPD’s March 6, 2017 final status update letter; and 2) the TA “has complied with all of the requirements regarding the missing documentation.” See petition, ¶¶ 43-44. The TA has attached a quantity of documents as exhibits to the petition to support its latter statement. *Id.*; exhibits C-R. The TA offers nothing to support its attorney’s former statement, however. By contrast, HPD has produced a copy of the March 6, 2017 final status update letter, which speaks for itself. See *Mompoin* aff in opposition, exhibit H. The court, thus, deems that counsel’s allegation of non-receipt is of “no probative value” in this proceeding, and rejects the TA’s first argument as unsupported. See e.g. *Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 (1st Dept 1997) (“[a]n attorney’s affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes

admissible proof”).

The TA’s other argument - i.e., that it has fully complied with all outstanding document submission requirements - is also a factual allegation, rather than a legal argument. HPD responds first by citing the TIL Program rules and regulations which govern “removal from the program,” and which provide that:

“HPD may remove a Building from the program and terminate the Tenant Interim Lease with respect to such Building if HPD determines that:

- (a) there is a default under the Tenant Interim Lease; or
- (b) the management of the Building has failed to comply with generally accepted standards of management; or
- (c) the Tenant Association has an inadequate record in regard to rent collections; or
- (d) the Tenant Association has an inadequate record in regard to timely payment of bills; or
- (e) the Tenant Association has failed to comply with HPD reporting requirements as set forth in the Tenant Interim Lease; or
- (f) the Tenant Association has failed to comply with HPD directives; or
- (g) HPD determines that the Building no longer meets the eligibility requirements of the program.
- (h) for any other reason, it is no longer in the best interests of the City to keep the Building in the program.”

28 RCNY § 34-07. HPD then notes that the August 9, 2017 termination notice stated that the TA was out of compliance with subparagraphs (b), (c), (e) and (f), which relate to management standards, rent collection, reporting requirements and HPD directives, in that the TA had made incomplete submissions of receivables regarding “management fees,” “monthly

meeting/minutes/attendance,” “financial reporting” and “rent collection.” *See* respondents’ mem of law, at 4-8; Mompoin aff in opposition, exhibit H. HPD then avers that it reviewed all of the exhibits attached to the TA’s petition, and notes that, although the TA “did finally, for the first time, prepare financial reports from 2016-2017 for this litigation,” the TA has still failed: 1) to provide the outstanding financial statements for each year that it managed the building; 2) to collect all outstanding rent arrears or commence litigation to recover it; or 3) to hold timely, regular meetings with all members present, and to furnish copies of the minutes and any resolutions to HPD. *Id.* The TA’s reply papers reassert unsupported factual allegations that they cannot submit records to HPD because they have no access to HPD’s computer system, and that HPD has prevented the TA from collecting sufficient rent to cover the costs of managing the building. *See* Johnson reply affirmation, ¶¶ 1-31. The reply papers are devoid of legal argument as to why HPD’s termination decision was an “arbitrary and capricious” act, nor do they specify which of the TA’s voluminous documentary submissions purportedly satisfy the “incomplete receivables” that HPD complained of. As a result, the court is unable to find that they do. Instead, having reviewed all of the many submissions itself, the court concludes that there are apparently still deficiencies regarding financial reports, rent collection and minutes of monthly meetings, and there were certainly more such deficiencies at the time that HPD issued the termination notice on August 9, 2017. As was previously discussed, 28 RCNY § 34-07 provides that such deficiencies constitute grounds for HPD to remove a tenants association from the TIL Program. It is, therefore, clear that HPD had a basis in the record for its termination decision. Further, it is well settled that “[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational.” *Matter of Metropolitan*

Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Here, the court finds that HPD's interpretation of 28 RCNY § 34-07 was quite reasonable. As a result, there are no grounds to find, as the TA urges, that HPD's termination decision was an arbitrary and capricious act. It was not. Accordingly, the court finds that this Article 78 petition should be dismissed as meritless.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby


ADJUDGED that the application, pursuant to CPLR Article 78, of petitioner 138 West 117th Street Tenant Association by Clarence Parker, President (motion sequence number 001), is denied and the petition is dismissed, with prejudice, with costs and disbursements to respondents.

And it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with Notice of Entry, within twenty (20) days of entry on counsel for Respondent.

Dated: New York, New York
October 31, 2018

ENTER:


Carol Robinson Edmead, JSC
HON. CAROL R. EDMEAD
J.S.C.