SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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THERA REALTY, LLC,

Petitioner,

– against –

THE ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

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DECISION/ORDER

Index No.: 156347/2018
Motion Seq. No: 001

MELISSA A. CRANE, J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in review of this CPLR Article 78 Special Proceeding/Declaratory Judgment Action: e-filed documents listed by New York State Courts Electronic Filing System (NYSCEF) numbered 1-7 and 16-28.

This special proceeding challenges penalties a landlord had to pay because of its tenant's unauthorized procurement of short-term apartment rentals through Airbnb. Thera Realty, LLC (petitioner) now seeks an Order, pursuant to CPLR Article 78, reversing a March 8, 2018 Appeal Decision and Order (Appeal Decision) of the Appeals Board of the Office of Administrative Trials and Hearings (OATH)[1] (first cause of action); and declaring the Appeal Decision arbitrary, capricious, an abuse of discretion, and affected by errors of law warranting a remand to OATH with a directive to grant petitioner's administrative appeal (second cause of action).

FACTUAL AND PROCEEDURAL BACKGROUND

Petitioner Thera Realty, LLC is the owner and landlord of a building known as 323 W. 42nd Street, New York, NY 10036 (the residential premises). On September 25, 2017 New York City Department of Buildings' (DOB) issuing officer Eduardo Cautela (I.O. Cautela) inspected

[1] The Office of Administrative Trials and Hearings (OATH) has jurisdiction to hear and determine summonses returnable to The Environmental Control Board (ECB) (*see* Title 48 of the Rules of the City of New York § 6-01, § 6-02 [2]).

the residential premises and observed multiple violations of the New York City Administrative Code (Administrative Code). Specifically, I.O. Cautela noted that apartments identified as #4B and #5B (collectively, the apartments), were transient use apartments, or short-term rentals, rather than legal, permanent dwellings. Consequently, I.O. Cautela issued petitioner summonses for the violations. A total of five summonses were issued numbered: 35292650R (Summons 50R), 35292654Y, 3529651Z, 35292652K, and 352926253M (Doc No. 3, 17, 18 and 19)[2] (collectively, the summonses). Only Summons 50R is the subject of the application now before this court.

Summons 50R (Doc No. 18) was issued for violating Administrative Code Sections, 28-210.3. The Violation Details section of Summons 50R states, in pertinent part, as follows:

> "Permanent dwelling used/converted for other than permanent-residential purpose. C/O #101001764 indicates premises as a class 'A' multiple dwelling. Illegal occupancy noted at apartment 4B and 5B and has been converted/used as transient use."

In the Remedy section, petitioner was advised to "[d]iscontinue illegal use." (*id.*) Summons 50R also directed petitioner to appear at OATH for a hearing on November 9, 2017 (OATH Hearing) to address this violation. Moreover, a checked box on Summons 50R states:

> "ILLEGAL CONVERSION – CLASS 1 Per 28-202.1 & 1 RCNY 102-01 additional penalty for continued violation of Article 210 of Title 28 also applicable." (*id.*)

At the OATH Hearing before hearing officer, Myra G. Michael (H.O. Michael), petitioner did not dispute the merits of the facts and evidence DOB presented in support of the summonses, that included photographs of advertisements on Airbnb's website – an online lodging marketplace – that listed the apartments as available for occupancy for less than 30 days (Oath Hearing transcript [Doc No. 20], 6: 17-22). Rather, petitioner asserted that on or about October 6,

[2] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

2017, petitioner served the tenants of these apartments with Notices to Cure (Doc No. 4) – predicate notices to commencement of a landlord/tenant summary holdover proceeding. These Notices to Cure directed the tenants to discontinue the transient use of the apartments and notified them that a failure to cure the violations would result in termination of their tenancy and eviction from the residential premises. Thereafter, petitioner alleges, the tenants surrendered possession and vacated the apartments on November 7, 2017. Petitioner maintained that prior to receiving the summonses, petitioner was not aware the apartments were being used as short term rentals (Petition [Doc No. 1], ¶ 12).

Petitioner did not present any proof at the OATH Hearing to demonstrate that the apartments were no longer transient use premises in violation of the Administrative Code (OATH Hearing transcript 8: 16-18). Petitioner also admitted at the OATH Hearing that it did not monitor Airbnb advertisements to see if any of its tenants were illegally using their permanent residences for transient use (*id.* 13: 22-25). The court notes that petitioner never commenced a landlord/tenant summary holdover proceeding because the tenants obviated the need to do so by voluntarily surrendering the apartments.

On November 30, 2017, H.O. Michael rendered a decision (OATH Decision) (Doc No. 23). H.O. Michael determined that the apartments were permanent dwellings illegally converted for transient use. H.O. Michael imposed statutorily prescribed aggregate penalties against petitioner in the amount of $8,200.00 for the five issued summonses, plus a penalty of $43,000.00 (the additional penalty) respecting Summons 50R stating, in pertinent part:

> "The instant summons also designates a violation of Building Code section 28-202.1 class 1 for an illegal conversion. Additional daily penalties for a continued violation of Article 210 of Title 28 is also applicable … The statutory penalty of $1,000.00 per day for the continued illegal occupancy, beginning on the date of the occurrence of the summons … until the date the tenants vacated

both apartments … totaling 43 days." (OATH Decision, p. 1-2).

None of the parties to this proceeding dispute that the additional penalty was a fine that H.O. Michael could impose solely at her discretion.

On or about January 3, 2018, petitioner filed an appeal (the Appeal) (Doc No. 6) of the OATH Decision requesting that the additional penalty be dismissed on grounds that petitioner: (1) was not aware the apartments had been converted for transient use and did not aid, abet, look the other way or cause the illegal use of the apartments; (2) took immediate action to correct the violations and (3) in fact cured the violations. Petitioner did not dispute H.O. Michael's calculation of the additional penalty as $1,000.00 per day for the 43 days, reiterated its lack of knowledge of the wrongdoing prior to the issuance of the summonses, and argued that the paid additional penalty of $43,000.00 was monetarily excessive under the facts of this case.

Ultimately, the Appeal Decision (Doc No. 2) affirmed the OATH Decision even though respondent, DOB, did not appear and/or oppose the Appeal petitioner filed. The Appeal Decision concluded that petitioner, as owner of the residential premises, was responsible and liable for any violations its tenants caused, adding that petitioner's lack of knowledge was not a defense to the imposition of the additional penalty pursuant to Administrative Code § 28-202.1.

By Notice of Petition and Petition dated July 9, 2018 (Doc Nos. 1 and 7), petitioner commenced this CPLR Article 78 special proceeding and declaratory judgment action against respondents, The Environmental Control Board of the City of New York (ECB) and the New York City Department of Buildings (DOB), seeking an order from this court reversing the Appeal Decision. Petitioner contends the Appeal Decision: (1) was arbitrary, capricious, based on error in law and an abuse of discretion, in that it: (a) failed to provide a rational basis for assessing the additional penalty; (b) failed to recognize lack of knowledge of the wrongdoing as a defense to

the imposition of the additional penalty; (c) improperly interpreted Administrative Code Section 28-202.1; and (d) failed to acknowledge that any delays in curing violations that necessitate the commencement of a landlord/tenant proceeding are beyond petitioner's control as it must comply with statutory timelines, and that eviction proceedings, by their very nature, take time.

Additionally, petitioner argues that: (1) its due process rights were violated because it is unconstitutional to issue OATH summonses only to owners, rather than to tenant wrongdoers; (2) the additional penalty is an improper application of punitive damages; (3) there is no reasonable policy objective or public interest for the imposition of these types of additional "discretionary" penalties; (4) before assessing an additional penalty, the hearing officer must make a distinction between landlord/owners who were not aware of their tenants' wrongdoing and those who were aware, or should have known, of the violations; and (5) the additional penalty was monetarily excessive.

Respondents' verified answer (Doc No. 16), generally denies the allegations in the Petition, contending that: (1) this court should transfer this matter to the Appellate Division, First Department as petitioner is seeking substantial evidence review of a final agency determination; (2) the additional penalty was reasonable, rational, and a proper exercise of discretion; (3) petitioner's lack of knowledge of a tenant's short-term rental use (transient use) of a permanent dwelling is not a defense to the Administrative Code violations; (4) petitioner offered no evidence, such as photographs, to demonstrate that it had, in fact, cured the violations; and (5) the additional penalty is not unconstitutionally excessive, is proportional to the substantial risks the existence of unlawful transient dwellings create, and is necessary to achieve the desired level of deterrence.

DISCUSSION

At the outset, a CPLR Article 78 special proceeding is generally used to review an administrative determination regarding the application of petitioner's own case and circumstances, as opposed to a constitutional violation affecting other similarly situated parties wherein a declaratory judgment may be appropriate (*Sacolick v Cagliostro*, 50 AD2d 875, 876 [2nd Dept 1975], *affd* 42 NY2d 861 [1977]). The application before this court is a "hybrid" Article 78 proceeding/declaratory judgment action (*Larabee v Governor of the State of N.Y.*, 121 AD3d 162 [1st Dept 2014], *affd* 27 NY3d 469 [2016]). Although a party may seek both a declaratory judgment and relief pursuant to CPLR Article 78 (*Price v New York City Bd. of Educ.*, 16 Misc 3d 543, 548 [Sup Ct, NY County 2007]), the court must address these applications separately because the practice, procedure and purpose of the remedies sought by each legal vehicle are separate and distinct.

CPLR ARTICLE 78 SPECIAL PROCEEDING:

It is well settled that in assessing a petition brought pursuant to CPLR Article 78, judicial review of administrative determinations is limited to the questions raised pursuant to CPLR 7803 (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Rocco v Board of Trustees, Police Pension Fund, Article II*, 98 AD2d 609 [1st Dept 1983]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination has any rational basis (*Roberts v Gavin*, 96 AD3d 669, 671 [1st Dept 2012]; *Matter of Clancy-Cullen Stor. Co. v Board of Elections of the City of N. Y.*, 98 AD2d 635, 636 [1st Dept 1983]).

The test of whether a decision is arbitrary or capricious is determined largely by "'whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ. Of Union*

Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 232 [1974]), quoting 1 NY Jur., Admin. Law, § 184, p. 609). Further, an arbitrary action is without sound basis in reason and without regard to the facts (*id.* at 232).

Respondents' assertion that this matter is improperly before this court, is misplaced as "the proper vehicle to challenge the final determination of an administrative agency is an Article 78 proceeding" (*45435 Realty Co. v City of New York*, 200 AD2d 501, 501 [1st Dept 1994]). When a party raises an issue of substantial evidence or questions the interpretation of the evidence, a transfer to the Appellate Division may be proper pursuant to CPLR 7804 (g) (*Matter of McLaughlin v New York City Hous. Auth,* 171 AD3d 518 [1st Dept 2019]; *Matter of Hammerl v Mavis*, 41 AD2d 724, 341 [1st Dept 1973], *affd* 34 NY2d 579 [1974]). However, here, a transfer is not appropriate because petitioner admits and accepts the facts and evidence from the OATH Hearing. In fact, this special proceeding seeks review of a statutorily expressed, original subject matter permitted to be heard before this court and that is "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 an abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803 [3]).

Petitioner's main argument is that there was no rational basis for assessing the additional penalty. Summons 50R was a Class 1 violation (Illegal Conversion) identified by Title 1 of the Rules of the City of New York (RCNY) § 102-01 as an immediately hazardous violation. New York State's Multiple Dwelling Law delineates permanent residential buildings as Class A multiple dwellings, while hotels are denominated as Class B multiple dwellings (NY Mult D § 4 [8] and [9]). Occupancy in a Class A building is limited to "permanent residency purposes" which is residential occupancies for 30 or more consecutive days (NY Mult D § 4 [8] [a]). It is

undisputed that petitioner's residential premises, is a Class A multiple dwelling subject to permanent occupancy limitations.

Administrative Code § 28-202.1 provides that civil penalties may be assessed for immediately hazardous violations, such as those Summons 50R identifies, and states that the "separate additional penalty *may* be imposed of not more than one thousand dollars for each day that the violation is not corrected. The commissioner may by a rule establish specified daily penalties" (emphasis added). Title 1 Section 102-01 (g) (1) of the RCNY states, in pertinent part, that "[d]aily penalties, if applicable, will accrue at the rate of $1,000 per day for a total of forty-five days running from the date of the Commissioner's order … unless the violating condition is proved by the respondent at the hearing to have been corrected prior to the end of that forty-five day period, in which case the daily penalties will accrue for every day up to the date of that proved correction." Therefore, if the Hearing Officer imposes this penalty, pursuant to Administrative Code § 28-202.1, the penalty must be $1,000 per day up to 45 days as specified by 1 RCNY § 102-01(g).

A challenge to an administrative action based on excess of punishment involves a determination of whether there was substantial evidence to support the finding and, if so, whether the punishment was so disproportionate, in light of all the circumstances, as to shock the sense of fairness (*Matter of Pell*, 34 NY2d at 230, 233 [1974]; *Matter of Ansbro v McGuire*, 49 NY2d 872 [1980]). In the case before this court, the additional penalty, if imposed with a reasonable basis, would not be excessive. The legislature intended the additional penalties, in part, to deter the existence of inherently hazardous violations. The $1,000/day penalty, for a maximum of 45 days, serves a compelling public interest to encourage vigilance and is proportional to the substantial risks inherent in the transient use of a permanent residence.

Petitioner contends the additional penalty was intended to deter wrongdoers and the hearing office applied the additional penalty erroneously, because petitioner was not the "wrongdoer." Petitioner's argument is without merit, because there has been no evidentiary and/or factual finding on this issue. Even so, the lack of knowledge of the existence of the type of violation at issue here, by itself, is not a defense against the imposition of the additional discretionary penalties (*Matter of JNPJ Tenth Ave, LLC v Department of Bldgs. of the City of N.Y.*, 2018 NY Slip Op 33479 (U), [Sup Ct, NY County 2018]).

Petitioner's asserts that its general duty to monitor its own buildings cannot reasonably include the duty to monitor dozens of websites and thousands of apartment listings to uncover any transient occupancy activity. However, this argument was never the subject of the underlying OATH Hearing. Moreover, petitioner's claim that OATH can only apply additional penalties to those who knew, engaged in, or permitted the continued violations, is likely incorrect. Petitioner failed to present any caselaw, statutory reference, or legislative history to conclude that Administrative Code § 28–202.1 can *only* apply when there is a finding that the landlord/owners knew, or should have known, of the transient use of the permanent residential premises. Finally, this court has no authority to establish limited standards and circumstances under which respondents can apply additional penalties in accordance with Administrative Code section 28-202.1.

Petitioner's self-serving claim that it lacked awareness of its tenants' illegal transient use of the residential premises was not an issue the OATH Decision or the Appeal Decision resolved. Pointedly, neither petitioner nor respondents had fact witnesses testify at the hearing about the allegations contained in Summons 50R, or any applicable defenses.

Nevertheless, neither the underlying OATH Hearing transcript, the OATH Decision nor the Appeal Decision analyzed the factors they considered in assessing the additional penalties (*Matter of Pamela Equities Corp. v Environmental Control Bd. of the City of N.Y.*, 59 Misc 3d 1007, 1014-15 [Sup Ct, NY County 2017]). H. O. Michael's utterances at the OATH Hearing such as, "Right" (OATH Hearing at 12, line 11), "Mm-hmm" (*id.* at 13, line 25) and "Yeah, mm-hmm" (*id.* at 13, line 25) in response to petitioner's declared ignorance of the tenant's wrongdoing and to petitioner's claim that it promptly served Notices to Cure, do not provide the court with sufficient insight into the reasons for exercising the discretion to impose the additional penalty. Although this court would ordinarily not disturb a hearing officer's decision to impose an additional penalty, OATH's mere discretion, in and of itself, is not a rational basis upon which to assess it. Again, there must be some established, sound criteria for the decision to impose these additional penalties other than the fact that it was a discretionary penalty that the hearing officer could impose if she or he felt like it (OATH Hearing at 11: 9-10).

The fundamental question before this court is not *whether* a discretionary penalty may be imposed, but rather *why* the hearing officer exercised the discretion to impose the additional penalty in the first instance. There can be no dispute that the discretionary penalty may be imposed when an inherently hazardous violation exists, as is the case here. However, imposing additional penalties in every and all cases where an inherently hazardous violation is cited would cease to make the additional penalty discretionary. Such application is contrary to the plain language of the statute that directs the penalty *may* be imposed. The mere citation of an inherently hazardous violation cannot be the sole and only reason upon which to apply the daily additional penalty.

Unfortunately, this court is unable to determine if the OATH Decision, affirmed by the Appeal Decision, exercised its discretion to impose additional penalties because: (1) petitioner failed to submit proof that it corrected the violation as directed to do so by Summons 50R; (2) the hearing officer questioned the veracity of the statements made by petitioner's attorney that petitioner was unaware of the tenants' illegal use of the apartments for transient use; or (3) the hearing officer believed the violation could have been cured sooner than 43 days. Without any affirmative statement as to the factual basis to support the hearing officer's discretion to impose the additional penalty, there is no "determination" on the matter that this court can review (*see Matter of Porter v New York City Hous. Auth.,* 169 AD3d 455, 469 n 8 [1st Dept 2019]; *Office Bldg. Assoc., LLC V Empire Zone Designation Bd.,* 95 AD3d 1402, 1405 [3d Dept 2012]; and *Matter of Barry v O'Connell*, 303 NY 46, 50, 51 [1951]). Most notably, the standard for judicial review of an administrative penalty is limited to whether the measure, or motive, for the penalty constitutes an abuse of discretion as a matter of law (*Matter of Ahsaf v Nyquist*, 37 NY2d 182 [1975]). Absent a stated reason to exercise the discretion to impose the additional penalty in this case, this issue is not yet ripe for judicial review (*Barry*, 303 NY at 51]).

DECLARATORY JUDGMENT ACTION:

A declaratory judgment is a discretionary remedy that a court may grant "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see Long Is. Light. Co v Allianz Underwriters Ins. Co.,* 35 AD3d 253 [1st Dept 2006]; *Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 [1st Dept 1999]) and a court may *sua sponte* convert an Article 78 proceeding to one for a declaratory relief when constitutional rights have been violated ([CPLR 103[c]; *Ames Volkswagen v State Tax Commn.,* 47 NY2d 345, 348 [(1979)]; *Matter of Scarano v City of New*

York, 86 AD3d 444, 445 [1st Dept 2011]). However, whether an administrative policy is improper is not appropriate for judicial review and a declaratory judgment is not the appropriate vehicle to enable judicial review. Indeed, "[c]ases which involve the courts in the direct management of administrative programs … have been found to be beyond the competence of the court and nonjusticiable" (*Wilkins v Perales*, 128 Misc2d 265, 269 [Sup Ct., New York County, 1985], citing to *Jones v Beame*, 45 NY2d 402 [1978]).

Petitioner's argument that additional penalties are punitive damages holding petitioner and other owners/landlords vicariously liable for the "wrongful" acts committed by its tenants, is misplaced. Although petitioner has a nondelegable obligation to maintain its building in a code compliant manner (*Morales v Felice Props. Corp.*, 221 AD2d 181, 182 [1st Dept 1995]), the additional penalty does not rise to the level of punitive damages. There is no evidence to support the proposition that the additional penalty assessment is meant to somehow "punish" petitioner for its tenants' wrongful act. Rather, the evidence indicates the legislative intent was to encourage a prompt correction of immediately hazardous violations that can threaten the safety of the public.

Petitioner's contention that respondents failed to acknowledge the time constraints involved in eviction proceedings is irrelevant. Petitioner was able to obtain a surrender of the apartments from two separate tenants in less than a month after service of the Notices to Cure without court intervention.

Petitioner's contention that its due process rights have been violated because DOB summonses are directed only to owners, rather than the primary wrongdoer tenants, is equally misplaced. Due process requires only that the government provide "[n]otice reasonably calculated … to apprise the interested parties of the pendency of the action and afford them an

opportunity to present their objections" (*Matter of Toolasprashad v* Kelly, 80 AD3d 530, 531 [1st Dept 2011]) [internal quotation marks and citation omitted]). Here, petitioner was served with Summons 50R on September 25, 2017. This notified Petitioner of the illegal transient use at its premises and petitioner was given an opportunity to present evidence and testimony at the OATH Hearing. Lastly, petitioner could appeal H.O. Michael's November 30, 2017 OATH Decision through a formal appeal process. As petitioner had an opportunity to be heard on Summons 50R, the requirements of due process have been satisfied.

Additionally, the Administrative Code mandates that an owner be held responsible for the unknown and illegal acts of the tenant. Title 28, Article 204 of the Administrative Code provides that any person violating the rules shall be liable in a proceeding commenced by a summons returnable before OATH and "[*a*]*ny* person who shall violate or fail to comply with any of the provisions of this code .... shall be liable for a civil penalty ... " (Admin. Code § 28-204.1) (emphasis added). Administrative Code Section 28-210.3 further provides "[i]t shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes." Here, respondents asserted that a tenant at petitioner's residential premises was in fact served with a summons (Doc No. 27, fn 7). Petitioner did not rebut this factual assertion, which contradicted its original claim that the tenant never received any summonses for the DOB violations.

This court has considered all remaining arguments raised in the Petition and Notice of Petition and finds them unavailing.[3]

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[3] Petitioner's claim that the additional penalty should not be assessed where hearing officers stand to benefit personally by rigid and punitive enforcements, is without any evidence to support it (Doc No. 1, at 12, ¶ 43).

CONCLUSION

Accordingly, it is hereby,

ORDERED that the application by respondents The Environmental Control Board of the City of New York and the New York City Department of Buildings to transfer this matter to the Appellate Division, First Department, pursuant to CPLR 7803(4), is denied; and it is further

ADJUDGED and DECLARED that petitioner, Thera Realty LLC's CPLR Article 78 special proceeding is granted to the extent that this matter is remanded to OATH for a limited de novo determination on a complete record setting forth a reasonable basis specific to the decision to assess the additional penalty as prescribed New York Administrative Code Section 28-202.1 with the noted understanding that the additional penalty is discretionary and applicable under the facts of this case wherein the Administrative Code Section 28-210.3 was violated.

DATED: 10/4/19

ENTER:

S/ J.

MELISSA A. CRANE, JSC

HON. MELISSA A. CRANE
J.S.C.