475 Kent Owner v Pomeroy
2020 NY Slip Op 31043(U)
April 20, 2020
Supreme Court, Kings County
Docket Number: Index No. 512835/2019
Judge: Katherine A. Levine
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

475 KENT OWNER,
Plaintiff,

-against-

BEN POMEROY, MICHAEL HIRSCH, KAYHAN TEHRANCHI, MARY DOHNE, KELLY NYKS, ARMIN BELLOVA, JUDY BELLOVA, BILL NOGOSEK, KATHLEEN GILRAIN, QUOC NGHI NGUYEN, STEVEN HARRINGTON, JAMIE ROJO, CRAIG WARD EDSINGER, BART JAVIER, MARIA JAVIER, CAITLIN WAID, ZACH VERDIN, MATTHEW LIPSON, RALF BEUSCHLEIN, MARY SIMPSON, MICHELE BURDIAK, HAGAI YARDENI, SIMON ARNOLD, EVE SUSSMAN, MISHA LIBMAN, VLADIMIR KARLOV, JARED SCOTT, GUY LESSER, LEE BOROSON, KIRSTEN HASSENFELD, SIMON LEE, ELIZA PROCTOR, KIRK EDWARDS, SIOBHAN OHARROW, ROB SWAINSTON, ALISON DELL, MCDAVID MOORE, CARY MCFARLAND, GREGOIRE ABRIAL, TATIANA PAJKOVIC, JEREMY DAWSON, and NEW YORK CITY LOFT BOARD,
Defendants.

Index No.: 512835/2019

DECISION/ORDER
HON. KATHERINE A. LEVINE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Petition and Verified Petition with Accompanying Affidavits and Exhibits	**1**
Verified Answer	**2**

Plaintiff 475 Kent Owner ("plaintiff"), the owner of the building known as "475 Kent Avenue, ("subject building"), brought this action seeking a preliminary and permanent injunction against the occupants of the subject building, who collectively are members of the Kent Tenants Association ("KTA") ("co-defendants" or "KTA members"), from interfering with plaintiff's

work to legalize the subject building and pursuing their alternate legalization plan and the narrative statement. For the following reasons, the court denies the motion for a preliminary injunction.

The subject building is registered as an Interim Multiple Dwelling ("IMD") under the Loft Law, Multiple Dwelling Law ("MDL") §§ 280-287. An IMD is "any building or structure or portion thereof located in a city of more than one million persons which (I) at any time was occupied for manufacturing, commercial, or warehouse purposes; (ii) lacks a certificate of compliance or occupancy ... and (iii) on December 1, 1981, was occupied for residential purposes ... as the residence or home of any three or more families living independently of one another." MDL § 281. The Loft Law was "designed to integrate ... uncertain and unregulated residential units, converted from commercial use, into the rent stabilization system" and "to provide for the transition of unregulated loft dwelling units into the rent stabilization system and to harmonize with, rather than supplant, existing forms of regulation." *Mtr. of Leonard St. Props. Group, Ltd. v New York State Div. of Hous. & Community Renewal*, 178 A.D.3d 92,104 (1st Dept. 2019).

In February 2017, plaintiff filed a narrative statement ("statement") with the New York City Loft Board ("Loft Board") for the subject building as part of its legalization process. The Loft Board is the administrative agency charged with regulating the legal conversion of lofts in the city from commercial/manufacturing to residential use. A narrative statement is a detailed description of the work proposed to bring a building and/or its units into compliance with Article 7-B of the MDL and other applicable laws. *See* 29 RCNY § § 2-01(a) and (d)(v). In March 2018, the KTA members submitted an alternate plan application[1] with the NYC Department of Buildings ("DOB"), and a narrative statement with the Loft Board. On March 29, 2018, plaintiff and the KTA members entered into an agreement ("agreement") wherein the KTA members agreed to: 1) withdraw the March 2018 alternate plan and waive comments on plaintiff's February 2017 Narrative Statement; and 2) waive their right to comment on "any and all Amended Legalization Work and/or amendments to the Narrative Statement." However, the Agreement specifically excluded from the waiver the KTA members' right to comment on proposed changes that would either affect the floor plan of their individual units or result in the diminution of services. After the parties entered into the Agreement, the Loft Board issued a certification on May 3, 2018 that plaintiff's narrative statement complied with all requirements of 29 RCNY § 2-01(d)(2).

In November 2018, plaintiff filed an amended narrative statement ("amended statement") with the Loft Board which included removing the gas ovens from all of the residential units, capping related gas piping, and replacing the gas ovens with electric equipment in the same location. It also included removing all existing walls and plumbing fixtures and creating new open kitchens, bedrooms and closets, and removing baseboard heaters within the units and

[1] "Alternate plan application" means an occupant's alteration application and associated legalization plan filed with the DOB pursuant to 29 RCNY§ 2-01(d)(2)(viii)

installing centralized heating and air conditioning. In accordance with 29 RCNY § 2-01(d)(2)(viii), the Loft Board issued a "Notice of Opportunity to File Comments or Alternate Plans" dated February 11, 2019 ("2/11/19 notice"), which gave the occupants 40 days to file comments on the amended statement with the Loft Board, or alternate plans with DOB. In March 2019, the occupants of the subject building - including the KTA members and six other occupants of the subject building who did not sign the Agreement - filed alternate plans with DOB and a narrative statement with the Loft Board with the goal of keeping the existing gas service for their cooking appliances. The Loft Board did not issue any written determination as to the amended statement.

In order to obtain a preliminary injunction pursuant to CPLR § 6301, plaintiff must clearly demonstrate all of the following: (1) a likelihood of success of on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities tipping in favor of the moving party. *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005); *Doe v Axelrod,* 73 N.Y. 2d 748, 750 (1988); *Vanderbilt Brookland, LLC v Vanderbilt Myrtle, Inc*., 147 A.D.3d 1106, 1109 (2d Dept. 2017). At this juncture, this court finds that plaintiff has failed to demonstrate a likelihood of success on the merits of its claim that the KTA members are legally barred from advancing an alternate legalization plan for the subject building.

First, it appears that many of the proposed changes included in the amended statement fall within the exception to the waiver clause permitting KTA members to comment on proposed changes that would either affect the floor plan of their individual units or result in the diminution of services. A question of fact exists as to whether the replacement of gas ovens with electric ovens constitutes a diminution of services, upon which co-defendants did not waive their right to comment. Similarly, the amended statement's proposals to remove all existing walls and plumbing fixtures and create new open kitchens, bedrooms and closets could very affect the floor plans of individual units.

The court also finds that co-defendants did not waive their right to comment on changes that were not necessary to legalize the subject property. 29 RCNY § 2-01(v) mandates that a narrative statement "include a listing of all noncompliant conditions, citation to the specific provisions of law or regulation that require their correction, and the work to be performed to correct them." It is not clear from the evidence provided by plaintiffs that all of the proposed changes were necessary to legalize the IMDs. Plaintiff submitted orders from the DOB's Commissioner to correct the following violations: 1) an illegal bypass installed on the gas meter on the third floor, 2) gas being supplied to the building without any test, inspection and certification by the DOB, 3) failure to maintain the building in a Code compliant manner to the extent that a gas pipeline was installed in the public corridor ceiling. The amended statement does not cite to any provision of the law or regulation which shows that the entire gas system was in a non-compliant condition or that the gas ovens needed to be replaced with electric ovens. Furthermore, the summonses which plaintiff submitted do not list the gas ovens as a violation requiring correction. Accordingly, questions of fact and law exist as to whether the changes were

necessary to legalize the property ,hence defeating plaintiff's claim that co-defendants waived their right to comment.

Plaintiff also moves for an order directing the Loft Board to certify plaintiff's amended statement, claiming that the subject building's current gas system is "dangerous and illegal" and "poses an imminent threat to the lives and safety of the building's occupants and the public at large," and that there would be irreparable harm is such relief is not granted. This claim is questionable since the current gas system has been in place for many years and plaintiff has not presented evidence to substantiate this claim. A balancing of the equities here favors maintaining the status quo pending the final determination of the legal issues presented. *See, Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 (2d Dept. 2009); *Murray v Town of N. Castle, N.Y.*, 62 Misc. 3d 179, 186 (Sup. Ct. West. Co. 2018). Accordingly, the court will not direct the Loft Board to certify the amended statement at this juncture.

Plaintiff also moves to compel the Loft Board to perform the discretionary act of certifying the amended statement. Co-defendants (KTA members) cross-move to dismiss on the ground that the court cannot direct the Loft Board to certify the amended statement because such an order would adversely affect occupants of the building who are not members of the KTA who did not waive their right to participate in the narrative process. The Loft Board also cross-moves to dismiss because its February 2019 Notice granting an opportunity to comment was not a final administrative determination ripe for judicial review, and because plaintiff failed to exhaust the administrative remedies set forth in 29 RCNY § 1-07(a)(2). All of these matters may fall by the way side since a framed hearing must be held on extant issues of law and fact noted by the court above. These motions can be addressed after the framed hearing which shall be scheduled by the parties in coordination with the court either when the courts reopen or via teleconference if feasible.

This constitutes the decision and order of the court.

DATED: April 20, 2020

Katherine A Levine

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KATHERINE A. LEVINE, J. S.C.

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