

Roche v New York City Loft Bd.

2023 NY Slip Op 31964(U)

June 9, 2023

Supreme Court, New York County

Docket Number: Index No. 101094/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. LAURENCE L. LOVE</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>JOHN ROCHE,</p> <p align="center">Petitioner,</p> <p align="center">- v -</p> <p>NEW YORK CITY LOFT BOARD, ARMSTRONG REALTY INC.,</p> <p align="center">Respondent.</p> <p>-----X</p>	<p>PART 63M</p> <p>INDEX NO. <u>101094/2022</u></p> <p>MOTION DATE <u>04/07/2023, 04/07/2023</u></p> <p>MOTION SEQ. NO. <u>001 002</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS.

Upon the foregoing documents, the instant Petition and Respondent, Armstrong Realty, Inc.’s motion to dismiss are decided as follows:

Petitioner, John Roche, commenced the instant Petition by filing same on December 15, 2022, seeking an Order pursuant to CPLR Article 78 reversing Loft Board Order No. 5184 and declaring the premises known as 120 Waterbury St. Brooklyn, NY 11206 to be an interim multiple dwelling as defined by Multiple Dwelling Law §281(6).

As described in said Loft Board Order, dated July 21, 2022, On July 2, 2019, Petitioner, the Tenant of unit 3A of 120 Waterbury Street (“Premises”) filed for Article 7-C coverage pursuant to MDL §281(6) and Respondent, Armstrong Realty, Inc. filed an answer to said application on July 26, 2019. Following a hearing, ALJ Noel R. Garcia recommended the denial of said application and the New York City Loft Board accepted said application finding as follows:

For Article 7-C coverage, the building must have been occupied for residential purposes by "three or more families living independently of one another." See, MDL§§ 281(1) and (6). Failure to prove three or more families living independently requires denial of the application. See, *Laermer v. NYC Loft Bd.*, 184 A.D. 2d 339 (1st Dep't. 1992); *Matter of Salle*, Loft Bd. Order No. 141 (Oct. 24, 1984); *Matter of Becker*, Loft Bd. Order No. 4412 (Jun. 18, 2015). The question before the Loft Board is whether Tenant and the occupants of the Third Floor lived independently as three or more families.

Pursuant to Title 29 of the Rules of the City of New York § 2-08(a)(3)(ii), indicia of "living independently" includes:

- (i) a separate entrance providing direct access to the residential unit from a street or public area, such as a hallway, elevator, or stairway within a building;
- (ii) one or more rooms such as a kitchen area, a bathroom, a sleeping area and a living room area arranged to be occupied exclusively by the members of a family and their guests, which room or rooms are separated, and set apart from all other rooms within a building; 5148
- (iii) such other indicia of independent living which demonstrate the residential unit's use as a residence of a family living independently.

To answer the question, both sides presented a diagram of the Third Floor of the Building. Owner's diagram showed the Third Floor as divided into eight rooms with one kitchen and three bathroom areas. Tenant's diagram showed the same eight rooms grouped into three units on the Third Floor. Unit 3A had a kitchen, a bathroom and one bedroom. Unit 3B was shown as three connected rooms and Unit 3C was shown as four connected rooms but neither had a kitchen or a bathroom within the unit. The rooms in Owner's diagram and spaces 3A, 3B and 3C on Tenant's diagram were accessed by a hallway in the middle of the floor. The hallway was not a public hallway leading from the street.

We agree that the overwhelming weight of the evidence shows that the Third Floor was used as communal living space. See, Report at 17. Instead of independent living, the evidence presented showed that the occupants of the Third Floor shared residential fixtures including the kitchen and bathrooms. The occupants shared expenses for groceries and other items like cleaning supplies and arranged weekly cleaning schedules of the kitchen and bathrooms on the Third Floor. See, Transcript at 803, 833-837 (groceries and

other expenses), 805 (cleaning chores) and Exhibit M2 (cleaning schedule). The occupants shared information about overnight or extended guests. See, Transcript at 843-846. When a room became vacant, the remaining occupants found a replacement. See, Transcript at 231- 232, 803, 822-82~. A 2019 article by Laurel Rogers described the "communal" life on the Third Floor. See, Exhibit D20. These facts are indicative of a group of roommates, not three families living independently. See, Matter of Becker, Loft Bd. Order No. 4412 (Jun. 18, 2015). See also, Matter of Kuonen et al., Loft Bd. Order No. 4333 (Oct. 24, 2014)(the rental of rooms with shared kitchen and bathroom do not create separate units.)

The pictures in the record support Owner's diagram of the Third Floor. The room doors were numbered. See, Exhibits D11-17. The doors connecting the rooms were constructed after the 2015-2016 window period. See, Transcript at 796-799. As an introduction to the Third Floor, new occupants and guests were presented with a letter listing the names of the other occupants by room number. See, Exhibit D19.

Moreover, we accept Judge Garcia's creditability findings regarding the testimonies of Kyle Ferguson, who lived on the Third Floor during the 2015 - 2016 window period and Laurel Rogers, who also lived on the Third Floor. See, Report at 19. The testimonies established that the occupants of the Third Floor did not live independently from one another.

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. CPLR 7803 (3); see, e.g., *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. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of . . . the facts." See *Matter of 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. However, 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.

In support of the instant Petition, Petitioner argues that the decision of the Loft Board was arbitrary and capricious as the entire proceeding was contaminated by the consideration of a transcript produced from an audio recording by Molly Vozick-Levinson of a meeting between Laurel Rodgers, a tenant in the Premises, Petitioner, and Petitioner's original counsel, Margaret Sandercock, Esq., which Petitioner argues was privileged as attorney communication. Petitioner further argues that his second attorney, Michael Kozek, Esq. of Ween & Kozek PLLC, did not defend against the admission of said transcript at the trial and when Kozek was relieved as attorney, failed to return evidence to Petitioner.

Contrary to Petitioner's arguments, the Vozick-Levinson Transcript was produced by Vozick-Levinson pursuant to a subpoena and if there was any attorney client privilege attached to same, it has been waived. While the contents of said transcript were devastating to Petitioner's Loft Board case, as said transcript includes Margaret Sandercock's refusal to continue representing Petitioner based upon her refusal to suborn perjury by presenting Petitioner's application to the Loft Board, same was not considered by the ALJ nor the Loft Board in deciding the issue. Further, the issue of Kozek's withdrawal and issues of his alleged failure to return evidence to Petitioner was discussed in detail by ALJ Garcia, who afforded Petitioner multiple adjournments to engage new counsel and prepare his case and further remedied any alleged failure to obtain evidence as Respondent's counsel provided a copy of all discovery materials to Petitioner. The Court further notes that the evidence that the Premises were used as a communal living space was overwhelming. As such, the decision of the Loft Board cannot be viewed as arbitrary and capricious.

ORDERED that the instant Petition is DENIED in its entirety; and it is further

ORDERED that Respondent’s cross-motion is GRANTED to the extent that this Petition is DISMISSED, however, the branch of Respondent’s motion seeking sanctions is denied.

6/9/2023
DATE


LAURENCE L. LOVE, J.S.C.

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