SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

----------X

CONCERNED TENANTS OF KNICKERBOCKER VILLAGE,

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, L&M DEVELOPMENT PARTNERS, LLC,KV OWNER, LLC,KNICKERBOCKER VILLAGE TENANTS ASSOCIATION

Defendant.

----------X

INDEX NO. 154878/2022

MOTION DATE 06/09/2022, 04/05/2023, 04/05/2023, 04/10/2023

MOTION SEQ. NO. 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 11, 12, 31, 47, 49, 51, 102, 107, 111

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 108, 112, 115

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 104, 105, 106, 109, 113, 116, 117

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98, 99, 100, 110, 114

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendants' motion to dismiss is granted in its entirety.

Facts

Petitioner is an unincorporated association composed of twelve tenants of Knickerbocker Village; an affordable housing community governed by Article IV of Private Housing Finance Law (PHFL). After defendants DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR), KV Owner and the Tenants Association signed a memorandum of understanding (MOU) and DHCR approved the proposed Knickerbocker Preservation Plan afterward, Petitioner brought

this Article 78 proceeding against said defendants, claiming the agency action violating CPLR §§ 7803(1), (2) & (3). Defendants filed the motion to dismiss the entire petition, arguing, *inter alia*, Petitioner lacks standing to bring this suit.

Motion to Dismiss General Standard

On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boeheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). "[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable". *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

Standing to Challenge the Approval Letter and the MOU in Article 78 Proceeding (The First and Second Causes of Action)

"Standing is a threshold requirement for a plaintiff seeking to challenge governmental action. The two-part test for determining standing is a familiar one. First, a plaintiff must show '*injury in fact*', meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be *more than conjectural*. Second, the injury a plaintiff asserts must fall within the *zone of interests* or concerns sought to be promoted or

protected by the statutory provision under which the agency has acted." *NY State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 209 [2004]. "Standing requires a showing of 'cognizable harm', meaning that an individual member of plaintiff organization 'has been or will be injured'. '*Tenuous*' and '*ephemeral*' harm is insufficient to trigger judicial intervention." *Id.* "(I)n the absence of *injury*, there is no standing to bring an article 78 proceeding." *Matter of E. Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938, 939 [2017].

Standing to Challenge the MOU

When stating the nature of the proceeding, CPLR §§ 7801(1) provides in pertinent part that "a proceeding under this article shall not be used to challenge a determination which is not *final*", a principle reaffirmed by the Court of Appeals: "[t]o challenge an administrative determination, the agency action must be *final* and *binding* upon the petitioner." *King* at 939.

The MOU at issue here states unambiguously that "the purpose of this MOU is to define the *understanding* of the above-named parties in connection with the proposed affordable housing preservation…" NYSCEF Doc. No. 3, page 1. No decision had been ever made in the MOU, let alone a final and binding one. The name of the document, a memorandum, says the nature of it. It is only used to document the involved parties' understanding of the proposed Preservation Plan. Understanding cannot be binding. Therefore, Petitioners cannot challenge the MOU and all allegations concerning the MOU will not be considered by the court, and thus should be dismissed.

Standing to Challenge the Approval Letter

Petitioners challenged the approval letter issued by DHCR on September 21, 2022, arguing that the decision made there violates CPLR §§ 7803 (1), (2) & (3). The approval letter bears the names of Governor Kathy Hochul and DHCR Commissioner RuthAnne Visnauskas. The letter does decide eight issues concerning, inter alia, the capital structure of the Knickerbocker Housing

Company. NYSCEF Doc. No. 71, pages 9-10. Accordingly, it could be deemed as a final and binding decision that can be challenged if Petitioner has incurred resultant injury.

Petitioner is an unincorporated association comprising twelve present tenants of Knickerbocker. NYSCEF Doc. No. 53, ¶ 10. An unincorporated association can establish its standing to challenge an agency decision in its own right or on behalf of its members. To establish standing in Petitioner's own right, the association must demonstrate that it suffered an "injury in fact" and that the injury falls within the "zone of interests" sought to be protected by the statute under which the agency acted. *Novello* at 209. Nowhere in the second amended petition does it say that Petitioner as an association has suffered any cognizable injury because of the approval. Therefore, the court turns to see if any member of Petitioner suffered a cognizable injury.

Petitioner and its affiant Isabel Reyna Torres identified the following injury incurred by its members: the right to be heard at future budget hearings; dilution of its bargaining power; the alleged financial repercussions from the equity change and the potential rent increase. NYSCEF Doc. No. 106, ¶ 16. NYSCEF Doc. No. 105, page 13. The court will examine each potential injury to see if it bestows standing on Petitioner.

First, the potential rent increase. Ms. Torres, a present Knickerbocker tenant, is wrong to say that the rent increase will fixate on a compound 2.5% upward trajectory after the three-year rent freeze period ends because 2.5% is only the upper limit for a rent increase, meaning the actual increase could be much less than the ceiling, or there could be no increase at all. Put differently, the potential injury flowing from the possible rent increase is not actual or imminent since no increase has materialized, and thus there is no "injury in fact". As admitted by Ms. Torres, the rent did increase in the past in Knickerbocker. Ms. Torres also said that it was tenants who would move in after the Preservation Plan takes effect hat will bear the brunt of the potential rent increase,

an admission that further questions Petitioner's standing to bring the suit. NYSCEF Doc. No. 106, ¶¶ 4, 9 &16. Ironically, in the same affidavit, Ms. Torres averred that the petition was at least partially brought to seek justice for future tenants who could be adversely affected by the Preservation Plan. That intention, although commendable, does not constitute actual injury. *Id.* ¶ 13. Accordingly, the potential rent increase will not be deemed as a legitimate injury to establish standing here.

Second, the court fails to see the connection between the equity change in the housing company and the possible financial repercussions vehemently argued by Petitioner. NYSCEF Doc. No. 53, ¶ 5. The equity change will affect the basis to calculate ROE paid to L+M. But the court could not understand how that change affects Petitioner's financial interests.

Third, the bargaining power. As pointed out by DHCR, no statute or contract has ever guaranteed Petitioner a certain amount or degree of bargaining power in the first place. NYSCEF Doc. No. 115, page 4. A non-guaranteed power cannot be the basis to establish standing even if that power has somehow diminished because Petitioner is only complaining about something to which they don't have a right from the beginning. Therefore, this argument is unpersuasive to the court.

Finally, the right to be heard at future budget hearings. As testified by Rebecca Koepnick, the Chief Strategy Officer of DHCR, "the Preservation Plan preserves the right of *any tenant* to challenge a proposed rent determination, or the *budgeted costs* on which the proposed rents are based." NYSCEF Doc. No. 70, ¶ 31. Therefore, that argument is unavailing.

Since Petitioner cannot formulate any cognizable injury resulting from the proposed Preservation Plan, the first and second causes of action against DHCR must be dismissed.

Since Petitioner has no private claim against co-respondent KV Owner or the Tenants Association, the third claim seeking declaratory judgment should also be dismissed. Based on the foregoing, it is hereby

ADJUDGED that the defendants' motion to dismiss the Article 78 proceeding is granted in its entirety pursuant to CPLR § 3211(a)(1); and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendants.

20230720135216LFRANK8B5E470A91C4209A70519F5B239F13B

7/20/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE