

**Terrilee 97th St., LLC v Department of Hous.  
Preserv. & Dev. of the City of N.Y.**

2010 NY Slip Op 32031(U)

July 28, 2010

Supreme Court, New York County

Docket Number: 102172/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
Justice

PART 61

TERRILEE 97<sup>TH</sup> STREET, LLC and HANK FRIED,

Petitioners,

-against-

THE DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT OF THE  
CITY OF NEW YORK, *et al.*,

Respondents.

INDEX NO. 102172/10

MOTION DATE June 3, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 119

The following papers, numbered 1 to 5 were read on this petition for a judgment pursuant to CPLR Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 is decided in accordance with the accompanying decision and judgment.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/28/10

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X  
TERRILEE 97<sup>TH</sup> STREET, LLC and HANK FRIED,

Petitioners,

DECISION AND  
JUDGMENT

Index No. 102172/2010

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

-against-

THE DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT  
OF THE CITY OF NEW YORK, RAFAEL E.  
CESTERO, as Commissioner of the  
Department of Housing Preservation and  
Development of the City of New York, VITO  
MUSTACIUOLO, as Deputy Commissioner  
of the Department of Housing Preservation  
and Development of the City of New York,  
and  
DEBORAH RAND, as Assistant Commissioner  
of the Department of Housing Preservation and  
Development of the City of New York,

Respondents.

-----X  
O. PETER SHERWOOD, J.:

In this Article 78 proceeding, petitioners Terrilee 97<sup>th</sup> Street, LLC ("LLC") and Hank Fried ("Fried") seek a judgment vacating and annulling the October 19, 2009 determination of respondent The Department of Housing Preservation and Development of the City of New York ("HPD"), which denied petitioner a Certification of No Harassment ("CONH"). In the alternative, petitioners seek to have the CONH awarded, or the application removed from the record in its entirety, without prejudice to petitioners. HPD, Rafael E. Cestero, as Commissioner of HPD, Vito Mustaciuolo, as Deputy Commissioner of HPD, and Deborah Rand, as Assistant Commissioner of HPD (collectively "respondents") seek dismissal of the petition contending that they acted reasonably, properly, and in conformance with all applicable laws and regulations.

*Background*

LLC is the owner of a building named the Royal Park Hotel, located on West 97<sup>th</sup> Street in New York, New York (the "building"). Fried is a member of the LLC and is the applicant for the

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CONH, since, only an “individual natural person” may apply for a CONH. The building is considered a Single Room Occupancy (“SRO”) dwelling, currently containing approximately 100 single room units.

According to respondents, several regulations were enacted in order to protect residents of SROs from being harassed by their building owners in an attempt to empty and convert the buildings. One such regulation, set forth in section 27-2093 of the Administrative Code of the City of New York (“Administrative Code”), also referred to as the Housing Maintenance Code, is the CONH, which is the permit that SRO building owners must obtain before conducting any renovations or demolitions. In order to receive a CONH, an application must be filed and approved by HPD. After an application is filed, the Commissioner notifies any interested persons, including the community board, and posts a conspicuous notice in the building, with the proposed plans. Any interested persons are able to submit comments orally or in writing regarding the proposed plans. After a 30-day period, the Commissioner may:

deny such certification without a prior hearing if there has been a finding by the office of rent control, the conciliation and appeals board or any court having jurisdiction that there has been harassment, unlawful eviction or arson by or on behalf of the owner at the multiple dwelling for which certification is sought during the stated period of time;... .

Administrative Code § 27-2093 (d) (3) (iii).

Chapter 10 of Title 28 of the Rules of the City of New York (“RCNY”) sets forth HPD’s rules regarding CONH applications, such as what information must be included in the application. Additionally, if HPD concludes that the application has a material misstatement of fact, HPD may deny the application and bar the submission of a new application for up to three years. HPD investigates whether there has been harassment at the proposed location and, in certain circumstances, a hearing may be held. However, if HPD determines that an unlawful eviction has taken place at the property during the inquiry period, HPD may deny the CONH application without a hearing. Section 10-05 (e) of 28 RCNY explains, in pertinent part:

If HPD determines that DHCR or a court having jurisdiction has found that there has been harassment, unlawful eviction, or arson at the property during the inquiry period, HPD may deny the certification without a hearing and issue a final determination in accordance with § 10-07 of this Chapter.

28 RCNY § 10-05 (e).

If the CONH is rejected by the Commissioner, the applicant may not apply for the same permit for renovations for a period of 36 months after the date of the rejection.

According to 28 RCNY § 10-11 (a), “[a]ny determination by HPD pursuant to this Chapter [10] shall be in the sole discretion of HPD.” Once HPD issues either an initial or final determination that there is reasonable cause to believe that harassment occurred on the property during the inquiry period, the CONH application may not be withdrawn (*see* 28 RCNY § 10-11 [b]).

On March 12, 2009, petitioner submitted a CONH application to HPD on behalf of the building in order to perform renovations to the “lobby, hallways, public spaces and rooms” (Petitioners’ Exhibit E, at 2). After this initial application, HPD requested more information via letter regarding any past litigation concerning the premises. HPD also requested more information on any other CONH applications that were either approved or denied for this or other premises owned by petitioner. Letters were exchanged between the parties.

On September 9, 2009, HPD requested more information from petitioner about a landlord/tenant court case, LT-16383/07, *Rafael Baez v Royal York Management*, related to the premises. The letter states the following, in pertinent part:

I was recently advised of the court case LT-15383/07, Rafael Baez v. Royal York Management, related to the subject premises. This court case was not provided in response to question number 19 with your original application or with your August 24, 2009 amendment to your application. Please update your application to include this proceeding and provide my office with the documentation for this case.

Respondents’ Exhibit G.

On September 10, 2009, petitioner responded with the following:

In response to your letter of September 9, 2009 regarding case #LT-15383/07, *Rafael Baez vs Royal York Management*, I have attached the “Cancellation/Room Closure Verification.” I am sorry that I cannot find any other back up for this case. I do know that the Emergency Placement Unit of the City of New York closed his case and relocated him to another facility.

Respondents’ Exhibit H.

The cancellation/room closure verification referred to by petitioner in his September 10, 2009 letter is a letter from the City of New York to petitioner, dated April 13, 2007, regarding client Rafael Baez. It is a memo notification which indicates that the emergency placement unit received notice that Baez was no longer residing at the building, that the date of cancellation is April 13, 2007, and that payments would be stopped for his room.

The record indicates that a hearing was held on April 20, 2007 in Housing Court, New York, New York. Baez had apparently been locked out of his apartment and commenced an illegal lockout proceeding against petitioner. Honorable Gerald Lebovits of the City Court of the City of New York issued an order indicating, “[a]fter oral argument, the court, for the reasons explained in the record, finds that petitioner was locked out illegally. Petitioner is restored forthwith” (Petitioners’ Exhibit D).

In any event, on October 19, 2009, petitioner received a final determination from HPD denying his application for a CONH. According to the notice received by petitioner, his application for CONH was denied, “pursuant to Section 27-2093 (d) (3) (iii) of the Housing Maintenance Code and Section 10-05 (e) of Chapter 10 of Title 28 of the Rules of the City of New York” (Respondents’ Exhibit J, at 1). As conceded by both parties, this notice is referring to the fact that a court having jurisdiction found that an unlawful eviction or harassment had occurred at the building during the inquiry period. Therefore, HPD was allowed, and chose to, pursuant to the regulations, deny the CONH application without a hearing. The notice to petitioner also advised him that he would not be able to apply for another CONH for three years from the date of the determination.

After petitioner received the notice from HPD, letters were sent back and forth between HPD and petitioner’s counsel. Petitioner explained the circumstances regarding the Baez hearing. He attempted to provide evidence that, as the transcript of the hearing would attest to, it was not petitioner’s fault that Baez was locked out. He also requested that his CONH application be withdrawn if it was not approved. On January 10, 2010, the Assistant Commissioner wrote back, “[p]lease be advised that your letter and the facts related to this case have been reviewed. The Determination Denying the Certification of No Harassment will not be withdrawn and that Determination remains in effect” (Respondents’ Exhibit M).

Shortly thereafter, petitioners commenced this Article 78 proceeding seeking to vacate HPD’s determination, or, in the alternative, withdraw the CONH application. Petitioners argue that, as based on the transcript of the Baez hearing, it was not petitioners’ fault that Baez was locked out.

As such, the conclusion made by HPD that petitioners committed any act of harassment or illegal eviction is arbitrary, capricious and lacks any rational basis in the law. Respondents argue that they acted rationally and reasonably in denying petitioner's application for a CONH.

### *Discussion*

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1<sup>st</sup> Dept 2006], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; see CPLR 7803 [3]). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citations omitted]" (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]).

Petitioners argue that HPD's decision was arbitrary, capricious and irrational in denying the CONH application. They maintain that HPD only based its decision on the ground that Baez was found to be illegally locked out. They continue that, as pursuant to the court's transcript, the decision to illegally close Baez's room was made by the City of New York in the April 13, 2007 letter, not by petitioners. According to petitioners, since petitioner was the only party listed as a respondent, it appears that an illegal lockout was issued against the building. Respondents argue that the decision by HPD, which was made in accordance with the Court's April 20, 2007 determination, should be upheld. Respondents maintain that the Court's decision was neither appealed nor reversed.

It is well settled that "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable [internal quotation marks and citations omitted]" (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. and Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481 [2008]; see also *Matter of Rizzo v New York State Division of Housing and Community Renewal*, 16 AD3d 72, 79 [1<sup>st</sup> Dept], *aff'd* 6 NY3d 104 [2005] [holding "an agency's interpretation of the operational practices attendant to the statute that it administers is entitled to deference"]). HPD is vested with the authority to approve or

deny CONH applications. Respondents investigated petitioner's application and saw that an illegal eviction had taken place on the premises. They gathered evidence and applied Administrative Code § 27-2093, which enables them to deny a CONH without a hearing if an illegal eviction or harassment has occurred on the premises. Based on the information provided to them, coupled with the fact that the Baez decision was not appealed, HPD decided to deny the CONH application. As such, HPD's decision, which was based on its investigation and relevant laws, is not unreasonable, and will not be disturbed. Accordingly, since respondents' interpretations and actions are upheld, petitioners' application is denied.

**Evidence Introduced After the October 19, 2009 Determination:**

Petitioners argue that the transcript of the Baez hearing should be considered by the court, since it was not reviewed by HPD when making its October 19, 2009 determination. Petitioners maintain that if HPD had actually reviewed the transcript, it would have seen that petitioners did not knowingly or willfully illegally lock out Baez. It appears that although HPD had access to the court records, it may have not reviewed the court transcript until after the October 19, 2009 determination. Petitioner also submitted explanatory letters after this determination. Respondents argue that only through its own investigation did it uncover this litigation, and that it based its determination only on any evidence it reviewed up until October 19, 2009. As a result, according to respondents, the determination made by HPD, as well as the record before the court, can only be based on the evidence reviewed by HPD in making its October 19, 2009 determination.

Petitioners did not provide, and respondents did not review, certain evidence prior to the October 19, 2009 determination, so the court has no duty to review it at this time. As the Court held in *Matter of Torres v New York City Hous. Auth.* (40 AD3d 328, 330 [1<sup>st</sup> Dept 2007]):

This Court has repeatedly rejected parties' attempts to raise issues on appeal where they neglected to raise those issues at an administrative hearing. [F]or a court to consider evidentiary submissions as to circumstances after the [Housing] Authority made its determination would violate [a] fundamental tenet of CPLR article 78 review – namely, that judicial review of administrative determinations is confined to the facts and record adduced before the agency [internal quotation marks and citations omitted].

As previously noted, HPD conducted its own evaluation. Petitioners were asked to indicate and explain whether the subject premises was involved in litigation. At first petitioners did not even



submit information regarding the April 20, 2007 hearing. After HPD requested such information, petitioner submitted the notice from the City of New York, without any further explanation. After reviewing the court file and conducting its own research, HPD made its determination. As this court has indicated, regardless of any extraneous information, the way that HPD came to its determination that the CONH should be denied, was rational, and will be upheld. The court will not review any supplemental information provided by petitioners that was not part of the original record before HPD.

Additionally, although respondents did not have a duty to review any supplemental information submitted to them after October 19, 2009, it appears that they did. Even after this additional review, respondents still denied petitioner's request via letter dated January 10, 2010.

**Withdrawal of the CONH Application:**

As provided for in 28 RCNY § 10-11 (b), a CONH application may not be withdrawn after a determination has been made that harassment occurred on the property in question. On October 19, 2009, HPD concluded that the CONH application would be denied, based on harassment and/or illegal eviction occurring on the premises. As set forth in this decision, the court will not disturb HPD's determination. Accordingly, the petitioner's request to withdraw his March 12, 2009 CONH application is denied.

***Conclusion***

Accordingly, it is hereby

**ADJUDGED** that the petition is denied and the proceeding is dismissed.

DATED: 7/28/10

ENTER:



O. PETER SHERWOOD

J.S.C.

**UNFILED JUDGMENT**

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