Hudson Val. Prop. Owners Assn., Inc. v City of Kingston N.Y.

2023 NY Slip Op 34640(U)

February 10, 2023

Supreme Court, Ulster County

Docket Number: Index No. EF2022-2130

Judge: David M. Gandin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

HUDSON VALLEY PROPERTY OWNERS ASSOCIATION, INC.; YUKON MANAGEMENT, LLC; KLONDIKE R.E., LLC; BLUE HOUSE KINGSTON 95, LLC; ROBERT DITTUS; OTIS APARTMENTS, LLC; THE FLYNN HOUSE, LLC; CIK, LLC; RONDOUT HOLDINGS OF NY, LLC; ANNAPURNA PROPERTIES, LLC; and KATHLEEN DITTUS,

Plaintiffs,

DECISION, ORDER & JUDGMENT

Index No. EF2022-2130

-against-

THE CITY OF KINGSTON NEW YORK; COMMON COUNCIL OF THE CITY OF KINGSTON NEW YORK; THE KINGSTON NEW YORK RENT GUIDELINES BOARD; NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

The following papers were read on this hybrid Article 78/Declaratory Judgment action and Motion to Intervene:

1. Order to Show Cause;
2. Petition;
3. Affidavit in Support (Richard Lanzarone);
4. Exhibits 1-14;
5. Memorandum of Law in Support;
6. Affirmation in Support (Matthew Brett);
7. Exhibits A-B;
8. Order to Show Cause;
9. Amended Petition;
10. Affidavit in Support (Matthew Brett);
11. Exhibit A;
11. Memorandum of Law in Support;
12. Memorandum of Law in Opposition;
13. Affidavit in Opposition (Bartek Starodaj);
14. Exhibit 1;
15. Affirmation in Opposition (Barbara Graves-Poller);
16. Exhibits A-F;
17. Reply (Matthew Brett);

18. Exhibits 1-4;
19. Notice of Motion;
20. Memorandum of Law;
21. Affirmation in Support (Marcie Kobak);
22. Affidavit in Support (Rebecca Garrard);
23. Affidavit in Support (Justin Nemon);
24. Affidavit in Support (Amanda Treasure);
25. Affidavit in Support (Lisa Lerner);
20. Answer;
21. Memorandum of Law in Opposition;
22. Affirmation in Opposition (Marcie Kobak);
23. Affirmation in Opposition (Rebecca Garrard)
24. Affirmation in Opposition (Justin Nemon);
25. Affirmation in Opposition (Amanda Treasure);
26. Affirmation in Opposition (Lisa Lerner);
27. Memorandum of Law in Opposition;
28. Answer;
29. Affidavit in Support (Bartek Starodaj);
30. Exhibits 1-2;
31. Affidavit in Support (Alderman Carl Frankel);
32. Exhibit 1;
33. Memorandum of Law in Opposition;
34. Answer;
35. Affidavit (Noah Kippley-Ogman);
36. Exhibits I-IV;
37. Affirmation (Matthew Brett);
38. Amended Reply;
38. Affidavit of Kevin Corte;
39. Affidavit of Kalman Fishbein;
40. Affidavit of Andrew Gladding;
41. Affidavit of Rory Kurtz;
42. Affidavit of Jennifer Herdman
43. Exhibits 1-6; and
44. E-mail of Kevin Corte dated June 29, 2021

In 1974 the State Legislature enacted the Emergency Tenant Protection Act ("ETPA") to address excessive rents that it found constituted a public housing emergency. Unconsolidated Laws §8621, *et seq*. When enacted, the Act was applicable only in New York City and Nassau, Westchester and Rockland counties. The Housing Stability and Tenant Protection Act of 2019 ("HSTPA") made the ETPA applicable to any city, town or village in the State. The ETPA is a form of local option legislation; it becomes effective upon a local legislative body declaring a public emergency as to a particular class of housing accommodations. To declare such an emergency, it must find that the vacancy rate for the housing class does not exceed five percent. *Id.*

In April and May of 2022 the City of Kingston's Director of Housing Initiatives conducted a vacancy study of multiple dwelling rental apartment buildings in the City with over six units built before January 1, 1974. The survey found a net vacancy rate of 1.57%. Following a public hearing, on July 28, 2022 the City of Kingston Common Council approved a resolution declaring a housing emergency in multifamily buildings with six or more units constructed prior to January 1, 1974 and opting into the ETPA.

Petitioners then commenced this hybrid proceeding pursuant to Article 78 and CPLR §3001 challenging the determination that a housing emergency exists in the City of Kingston and the imposition of rent control. Petitioners claim that the vacancy survey underlying the City's resolution was flawed. They claim that their independent survey for the same class of housing conducted in July through October 2022 resulted in a vacancy rate of 6.22%. Subsequent to the filing of the petition, the City of Kingston Rent Guidelines Board ("RGB") enacted guidelines finding that rental increases over 16% of a tenant's existing rent as of January 1, 2019 constituted a rent overcharge. The RGB further determined that all one and two year lease renewals required a 15% rent decrease. Petitioners then filed an amended petition and moved for an injunction challenging the imposition of these guidelines to existing and new lease agreements. This Court issued an Order dated December 2, 2022 declining to enjoin on an interim basis the declaration of a housing emergency but enjoining application of the RGB's lease adjustment guidelines during the pendency of this proceeding.

The City's declaration of a housing emergency constitutes a legislative act and is therefore presumptively valid. See *Spring Valley Gardens Assocs. v. Marrero,* 100 AD2d 93 (2nd Dept. 1984). The presumption of validity has the effect of: (1) imposing the burden of proof on the party questioning the resolution; and (2) sustaining the resolution if the propriety of its enactment is fairly debatable." *Id.* at 99 *citing De Sena v. Gulde,* 24 AD2d 165 (2nd Dept. 1965). Here, petitioners' challenge to the declaration is based on a claim that the City's survey finding a 1.57% vacancy rate was not an accurate accounting of the true vacancy rate for the subject properties. Petitioners claim the findings were arbitrary and capricious. The ETPA does not specify any particular method as to how a municipality is to determine a vacancy rate for a class of housing accommodations. It merely states that it is a matter for local determination. ETPA §3(a). Accordingly, if the municipality acts in a reasonable manner in conducting the survey, it is not this Court's function to second-guess its methodology or results. In determining whether a survey was reasonable in this context, precedent suggests the Court should look at whether it was taken in good faith, based on reliable data and followed a commonsense approach. See *Spring Valley Gardens Assocs.,* 100 AD2d at 100.

The Director of Housing Initiatives Bartek Starodaj performed the challenged vacancy survey. Starodaj has both a degree and professional background in urban studies. In addition to working for five years at an urban and regional policy non-profit organization, he served as the Board of Directors of the Kingston City Land Bank since 2018. In his capacity as Director of Housing Initiatives he asserts he facilitates the sale of city-owned properties for housing redevelopment and oversees the disbursement of grant funding for property rehabilitation and construction of housing. He states that his work regularly involves analyzing housing data for the City of Kingston. Starodaj states that he modeled the methodology he used to conduct the vacancy study on that used in a 2020

study the Center for Governmental Research ("CGR") conducted for the City of Kingston. He also used the CGR study and information obtained from the City of Kingston Assessors's office to develop a list of eligible properties. Starodaj then sent a rental vacancy survey to each eligible property owner via certified mail so that he could track the delivery of each survey. He modeled the survey language on the CGR 2020 study surveys. Envelopes were pre-printed with the City of Kingston seal and signifying that they were official mail from the Department of Housing Initiatives. Each survey letter contained a prominent warning stating that a response was required by May 2, 2022, and further advising that the Department of Housing Initiatives "may attempt to obtain occupancy data on your property via a site visit" if it did not receive a response. The letter further stated, however, that the Department would assume there were no vacancies in the building if it did not receive a response and was unable to obtain occupancy data. Starodaj's affidavits further detail the efforts he took to collect data from non-responsive property owners.

Starodaj states that the properties surveyed largely paralleled those surveyed by the CGR study with the exception of properties he determined were ETPA-ineligible. He has presented a spread sheet indicating dates on which he personally visited properties for which the certified mail was returned to his office as undeliverable. For properties that had failed to provide owner contact information as required by the City's administrative code, he indicates he called the properties' official phone numbers or made efforts to contact building managers. Starodaj asserts that he received a total of 25 survey responses, which comprised 40.7 percent of the properties included in the study group. He represents that these responses encompassed 911 units, constituting 71.7 percent of the total surveyed units. He states that responses to the survey were received via a mix of online responses, phone calls, emails and physical mail delivered to City Hall. Starodaj states that in an effort to not include rental units unavailable because they were undergoing renovations, he excluded from the study group vacant apartments that were not actively on the rental market. Starodaj asserts that the difference between the 6.7% vacancy rate resulting from the CGR 2020 survey and the 1.57% vacancy rate in 2022 was consistent with other data from the past two years demonstrating decreased rental inventory and a corresponding rise in rental prices in the City of Kingston. His affidavit cites to numerous studies and articles finding that Kingston has experienced a significant influx of new residents over the past two years resulting in significant increased pressure on its housing markets and inventory.

Petitioners challenge to the City's 2022 housing survey is based primarily on the independent survey they conducted from July through October of 2022 finding a 6.22% vacancy rate and the 2020 CJR survey finding a 6.7% vacancy rate. Petitioners question the thoroughness of the City's data collection efforts and assert that there was an insufficiently adequate response rate to validate the survey's findings. They assert that the City only included 59 of the 64 ETPA eligible properties in its survey, and cite to specific properties they allege were not surveyed correctly. Petitioners further maintain that the 2020 United States census reflected only a 0.6% population increase in Ulster County between 2020 and 2021 and thus there is no "credible argument" that the vacancy rate of eligible units in Kingston plummeted from 6.7% in 2020 to 1.57% in 2022. They claim that their independent survey was conducted in a much more thorough manner than the City's survey and reflects the true vacancy rate. Based on the foregoing, petitioners contend that the City's survey

results were "preordained" and designed to derive a vacancy result to meet predetermined policy initiatives.

The ETPA charges local governments with the responsibility of conducting housing vacancy surveys. Thus, the function of this Court is to assess whether the City's survey was conducted in good faith, used a proper methodology and was based on a common sense analysis of available data. While the 2020 CGR survey and petitioners' survey have some bearing on this assessment, ultimately it is the reasonableness of the City's survey that is at issue.

The Court rejects petitioners' contention that the language of the survey stating that the Department of Housing Initiatives "may" attempt to obtain occupancy data if it did not receive a survey response misled owners about the need to respond. The plain language did not state that Housing Initiatives would take efforts to obtain occupancy rates should the owner fail to respond. Hence, the letter was not misleading because it could not reasonably be read to infer follow-up visits would occur as a matter of course. The letter also expressly stated the consequences of not responding. The record reflects that the City surveyed 59 eligible buildings with a total of 1,270 units. It obtained responses from owners of 25 buildings constituting 49.1% of the eligible buildings. However, those responses totaled 911 of the 1,270 eligible units, constituting a response rate of 71.7% of applicable units. Notably, this response rate exceeds the 61.5% of total units surveyed in *Spring Valley Gardens Assoc. v. Marrero, supra.* Starodaj asserts he excluded five addresses that were included in the prior vacancy study because the Department of Housing Initiatives failed to receive certified mail receipts for the delivery of the survey to the corresponding property owners. He maintains that even if these properties had been included with an assumption that all units therein were vacant, the city wide vacancy rate would still not exceed 5%.

The Court further rejects petitioners' contentions challenging the number of available and vacant units at 166 West Chestnut Street, 500 Washington Avenue and 23 John Street. Starodaj asserts in his affidavit that he mailed the survey to the three different property owners of these addresses on file with the City of Kingston, received responses, and subsequently spoke with a property manager who provided information consistent with the survey responses. Starodaj also states that subsequent to submitting the survey, he spoke to the owner of 23 John Street who said that an initially listed vacant property had been rented and thus Starodaj modified the survey result accordingly. Starodaj excluded properties located at 84 Fairmont Street, 238 Albany Avenue and 260-267 Clinton Avenue because they were boarding houses not eligible for inclusion under the ETPA.

When reviewed as a whole, petitioners fail to demonstrate that the City's Director of Housing Initiatives' survey results were unreasonable. The measures detailed in Starodaj's affidavits demonstrate a good-faith effort to obtain accurate survey results. He further details that he took reasonable follow-up efforts in an attempt to get as many survey results as he could. The ultimate results were based on data obtained from over 70% of the eligible units. It is significant that the survey was sent on official City letterhead and expressly advised property owners that a failure to respond would result in the City finding that no vacancies existed. While petitioners claim they

obtained a 100% survey participation rate resulting in a 6.22% vacancy rate, property owners had a vested interest in participating in the private survey which petitioners ostensibly conducted for the express purpose of challenging the imposition of rent control. As set forth above, the presumption of validity casts the burden of proof on the petitioners questioning the legality of the City of Kingston's declaration of a public housing emergency. This Court is required to give deference to the City's survey results provided they were made in good faith based on reasonably adequate data and proper methodology. While Petitioners have presented affidavits and an alternative statistical analysis based on disagreements about the eligibility and vacancy rates of certain properties, they ultimately fail to meet their burden of demonstrating the unreasonableness of the survey or that it was carried out in an arbitrary and capricious manner. The mere presentation of some disputed issues of facts provides an insufficient legal basis for the Court to invalidate the study. Based on the foregoing, it is

ORDERED that petitioners' claims pursuant to Article 78 challenging the determination of the City of Kingston to declare a public housing emergency in multi-family buildings with six or more units constructed prior to January 1, 1974 is denied. It is further

ORDERED that the Court finds the City of Kingston resolution of July 28, 2022 declaring a public housing emergency pursuant to the ETPA was lawfully made. Pursuant to ETPA §3, however, the City is required to declare the emergency at an end once the vacancy rate of this class of housing exceeds 5%. The record reflects that the City counsel has approved a resolution requiring the housing director to perform a new vacancy study every three years.

Petitioners next challenge the orders of the Rent Guidelines Board of November 9, 2022 holding that: (1) any rental increase above 16% of the rent a tenant was charged on January 1, 2019 constitutes a rent overcharge; and (2) upon renewal, landlords must decrease all rents by 15%. The regulation of rents under the ETPA is governed by ETPA §6. That statute provides that after the local effective date of adopting the ETPA, an owner may not charge or collect any rent in excess of the initial legal regulated rent. ETPA §6(a). There are two mechanisms set forth to determine the initial legal regulated rent. Section 6(b)(2) states that the initial legal regulated rent for housing accommodations in a City having a population of less than one million shall be "the rent reserved in the last effective lease or other rental agreement." Such rent "may be adjusted on application of the tenant" pursuant to a fair market rent appeal in accordance with procedures set forth in ETPA §9. Those procedures enable a tenant to apply for an adjustment of the initial legal regulated rent if it is in excess of the fair market rental value. ETPA §9. It enables either an owner or tenant to file with the State Division of Housing and Community Renewal ("DHCR") an application for an adjustment of the initial legal regulated rent within sixty days of the local effective date enacting the ETPA or the commencement of the first tenancy thereafter, whichever is later. See ETPA §9(a). Upon such application, DHCR is permitted to adjust the initial legal regulated rent upon a finding that the initial legal regulated rent for the challenged unit is substantially different from the generally prevailing rents in the same area for substantially similar housing accommodations. *Id.* To file a fair market rent appeal, a tenant only needs to allege that the rent is in excess of the fair market rent and facts in support of the claim. ETPA §9(b). DHCR is then to consider guidelines that the RGB has

promulgated governing the determination of what constitutes a fair market rent for the rental units subject to the ETPA within its jurisdiction. If DHCR finds that the rent charge is in excess of the fair market rent, it "shall order a refund, of any excess paid since....the date of the commencement of the tenancy." *Id.*

The Kingston Rent Guidelines Board derives its authority exclusively from the ETPA. See ETPA §4. It is charged with establishing annual guidelines for rent adjustments. *Id.* A newly created Rent Guidelines Board is required to file "[a]s soon as practicable" with DHCR its findings for the preceding calendar year accompanied by a statement of the maximum rates of rent adjustment for leases or other rental agreements commenced during the next succeeding twelve months. Nothing in the ETPA authorized the RGB to make a blanket determination that all subject units are subject to a maximum rent increase of 16% retroactive to January 1, 2019 and an immediate 15% rent reduction. While a majority of members on the RGB may hold good faith beliefs that many or all of the subject units have been paying above market value rents since January 1, 2019, the RGB lacked statutory authority to simply declare rent adjustments for all subject units based on fixed percentages. The ETPA mandates specific procedures and guidelines for the establishment of initial legal regulated rents, challenges to those rents by tenants and unit owners and the RGB setting annual maximum rates of rent adjustments. See generally *Matter of Bradcord Assoc. v. Conciliation & Appeals Bd. of City of NY*, 52 AD2d 565 (1st Dept. 1976). Those procedures require a case by case determination as to the fair market rental value for each unit challenging its initial legal regulated rent. See *Matter of Fresh Meadows Assoc. v. NYC Conciliation & Appeals Bd.*, 400 NYS 2nd 976 (NY Co. 1977), *aff'd* 63 AD2d 943 (1st Dept. 1978).

In addition, nothing in the ETPA authorized the RGB to impose a rent reduction rollback date of January 1, 2019. *Id.* Significantly, the Housing Stability and Tenant Protection Act of 2019 which enabled the City of Kingston to enact rent regulation pursuant to the ETPA became effective June 14, 2019. It expressly provides that it "shall take effect with respect to any . . . city, or any town or village [with a population of less than one million residents] whenever the local legislative body of [that] city, town or village determines the existence of a public emergency pursuant to [the ETPA]." HSTPA Part A, Section 1-a. Thus, there was no lawful authority for the imposition of rent control in the City prior to its declaration of a housing emergency. The practical effect of the RGB creating rent increase limitations retroactive to January 1, 2019 is to rewrite the effective date of the HSTPA. The declaration of a rent overcharge predating the enactment of the enabling legislation would also be an impermissive retroactive application of the HSTPA. See *Regina Metro. Co., LLC v. NYS Div. of Hous. & Cnty. Renewal,* 35 NY3d 332 (2020). Moreover, the City commissioned CGR study found a vacancy rate as of February 2020 in excess of the 5% threshold for adoption of the ETPA. Thus, there was no factual predicate under the ETPA to impose rent control as of February 2020. Based on the foregoing, it is

ORDERED that the determination of the City of Kingston Rent Guidelines Board of November 9, 2022 determining rental increases of over 16% of existing rents as of January 1, 2019 constitute a rent overcharge and that all renewal leases shall decrease the existing rent by 15% is vacated. Such findings were affected by an error of law. It is further

ORDERED that this matter is remitted to the City of Kingston Rent Guidelines Board to establish guidelines for the maximum rate of rent adjustments consistent with this Decision and Order and ETPA §4(b). It is further

ORDERED that the unopposed motion of Citizen Action New York, For the Many, Amanda Treasure and Lisa Lerner to intervene as respondent parties pursuant to CPLR §7802(d) is granted. Counsel for the proposed interveners shall file a Notice of Appearance forthwith and the caption of this action shall be amended to include the intervenors as respondents.

The foregoing constitutes the Decision, Order and Judgment of the Court. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: February 10, 2023
Kingston, New York

ENTER:

DAVID M. GANDIN, J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty (30) days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty (30) days thereof.