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Kim v. United Am. Land LLC

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART B

WALTER KIM,

Index No.: LT 6025-21/NY

Petitioner,

Mot. Seq. No. 1

-against-

UNITED AMERICAN LAND LLC,
ALBERT LABOZ,

DECISION/ORDER

Respondent,

-and-

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NY,

Subject Premises:
33 Union Square W., Apt 4R
New York, NY 10003

Co-Respondent.

HON KAREN MAY BACDAYAN, JHC

Manhattan Legal Services, by Adriana Price, for Petitioner
Kucker Marino Winiarksy & Bittens LLP, by Joseph Goldsmith, for Respondents
Alexander Keblish, of counsel, for Co-Respondent

Recitation, as required by CPLR 2219 (a), of the papers considered in review of this motion to dismiss, listed by NYSCEF document number: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25, 28.

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

FACTUAL BACKGROUND

The Petitioner Walter Kim (“Petitioner”) in this Housing Part (“HP”) proceeding seeks an order directing Respondents to correct violations of the Housing Maintenance Code of the City of New York of the Code (“Code” or “HMC”) and entry of a judgment against Respondents for the penalties set out in the Code upon their failure to correct.

A request for an inspection by the New York City Department of Housing Preservation and Development (“HPD”) filed with the petition alleged the following conditions to need repair:

1. HVAC/Heat/AC
2. No baseboard heat
3. Windows/some cannot open
4. Floor buckling
5. Broken microwave
6. Oven not properly working; and
7. Exposed wires in ceiling. (NY St Cts Elec Filing [NYSCEF] Doc No. 29 at 5.)

The petition also seeks a finding that Respondents, United American Land LLC and Albert Laboz, have harassed Petitioner pursuant to section 27-2005 (d) of the Code based on the failure to provide essential services and verbal intimidation, and, upon such a finding, granting relief including an order restraining further harassment and civil penalties.

HPD inspected the premises on September 9, 2021 and issued the following Code violations:

1. Arrange and make self-closing the entrance doors (a class “C” violation); and
2. Properly repair and abate unsafe electric wiring condition consisting of exposed electrical wires (a class “B” violation).¹

The parties do not dispute that the premises that is the subject of this proceeding is an interim multiple dwelling pursuant to Article 7-C of the Multiple Dwelling Law also known as the Loft Law. (NYCEF Doc No. 5, Laboz affidavit ¶ 4; NYCEF Doc No. 25, Price affirmation ¶ 7.) Nor do the parties dispute that, as set forth on the HPD open violations report (“HPD Violation Report”), the subject building is registered with HPD and comprises 18 Class A dwellings.² (NYSCEF Doc No. 22, Violation Report.) Finally, the parties do not dispute that Petitioner has a pending application before the Loft Board for diminution of services – specifically, the failure to repair the HVAC system, inoperable windows, buckling wood floors –

¹ While the inspector’s written notes indicate additional violations related to defective window spring balances, wood floors in need of repair and infestation of mice, these were not cited as violations in the official HPD Violation Report resulting from the September 9, 2021 inspection. (NYSCEF Doc No. 22.) Moreover, HPD itself argued that the court should issue an order to correct only for these two violations. (NYSCEF Doc No. 18, Keblish affirmation ¶ 15.)

² The Violation Report is annexed hereto and incorporated by reference herein.

as well as for harassment for failure to make those repairs and verbal abuse. (NYSCEF Doc No. 12, Respondents' exhibit F, Loft Board application TM-0095.)³

Respondents United American Land LLC and Albert Laboz ("Respondents") have moved to dismiss the petition arguing that the court lacks subject matter jurisdiction to hear claims for violations and harassment in an interim multiple dwelling. Alternatively, Respondents argue that the petition should be dismissed because a prior proceeding is currently pending before the New York City Loft Board.⁴

For the following reasons, the court finds that the HP proceeding should be dismissed in part, and that an Order to Correct should be issued for the two violations of record placed by HPD.

DISCUSSION

The Scope of the Loft Board Regulations

Pursuant to its statutory authority, the Loft Board has promulgated a list of minimum housing standards and services that must be provided to residential occupants of interim multiple dwellings. Those minimum standards are: 1) Water supply and drainage; 2) Heat; 3) Hot water; 4) Electricity; 5) Gas; 6) Smoke and carbon monoxide detectors; 7) Public lighting; 8) Entrance door security; 9) Elevator service; and 10) Window guards. (NY City Loft Board Regulations [29 RCNY] § 2-04 [b] [1]-[10].)

However, the Loft Board's authority is not limited to the enforcement of those enumerated conditions alone. The Loft Board regulations also provide for the maintenance of additional services that may be contained within a rental agreement with a residential occupant.

"In addition to those services mandated by § 2-04 (b) of this Rule, landlords must maintain and continue to provide to residential occupants *services specified in their lease or rental agreement*. In the absence of a lease or rental agreement, landlords must provide those services to residential occupants which were specified in the lease or rental agreement most

³ Together, each of Petitioner's grievances are either already before the Loft Board, or alleged in the instant proceeding.

⁴ The court ordered a briefing schedule requiring service and filing of a reply, if any, by December 20, 2021. (NYSCEF Doc No. 23.) No reply was filed, and, upon inquiring, respondents provided no reasonable excuse for the failure to do so.

recently in effect in addition to those services mandated in § 2-04 (b) above. There must not be any diminution of services.” (NY City Loft Board Regulations § 2-04 [c] [emphasis added].)

Petitioner’s lease provides:

“Warranty of Habitability. All sections of this lease are subject to the provisions of the Warranty of Habitability. . . . Nothing in this lease can be interpreted to mean that you have given up any of your rights under that law. Under that law, Owner agrees that the Apartment and the Building are fit for human habitation and that there will be no conditions which will be detrimental to life, health or safety.” (NYSCEF Doc No. 7, Respondents’ exhibit A, lease ¶ 7.)

The provisions of the Loft Board rules and Petitioner’s lease, which relate to and refer to each other, instruct the court that Petitioner’s claims for harassment, broken windows, inoperable HVAC, and buckling wooden floors are properly before the Loft Board. As Petitioner himself argues in his pending complaint before the Loft Board, conditions not specifically itemized as minimum housing standards fall within the Loft Board’s jurisdiction. (NYSCEF Doc No. 12, Respondents’ exhibit F, Loft Board application TM-0095, ¶¶ 15-16.) The Loft Law provides that a lease agreement which includes the warranty of habitability (even if the lease is expired) is incorporated into the obligations of the landlord to the tenant, and that “there must be no diminution of services.” (NY City Loft Board Regulations § 2-04 [c].) Petitioner’s lease provides the standard for diminution of services related to the warranty of habitability: “any conditions detrimental to life health and safety.” (NYSCEF Doc No. 7, Respondents’ exhibit A, lease ¶ 7.) Thus, Petitioner’s allegations currently before the Loft Board are related to the minimum services that must be provided in the subject premises and are properly being adjudicated there. (*See Matter of Seyfried*, OATH Index No. 127/97 [Jan. 3, 1997] [“Services required as part of the warranty of habitability are therefore part of the minimum housing maintenance standards, and the failure to provide such services, even where they have never been provided before, constitutes a diminution of services under section 2-04 (c).”], available at http://archive.citylaw.org/wp-content/uploads/sites/17/oath/97_Cases/97-127.pdf [last accessed Jan. 19, 2022]; *Loft Bd. v Difar Realty Corp.*, OATH Index Nos. 1970-71/96 [Aug. 14, 1996] [finding that breaches of the statutory warranty of habitability constitute violations of minimum

housing standards pursuant to section 2-04 (c) and issuing penalties and an order directing repair of various violations related to inoperable windows in a loft unit as well as a damaged wood floor] [NY Legal Publishing Case Notes]; *Loft Bd. v Century Realty, Inc.*, OATH Index No. 1673/97 [March 30, 1998] [fining owner for three unenumerated violations including defective plaster wall, defective ceiling tiles, and a rodent infestation] [NY Legal Publishing Case Notes].)

Regarding Petitioner's allegations of harassment, his claim before the Loft Board is that he has been harassed because of the Respondents' failure to provide a working HVAC system, failure to repair the buckling wood floor, failure to repair the broken windows, and verbal harassment are tantamount to the claim raised in the instant Housing Part proceeding. These claims, which fall within the definition of harassment contained in the Loft Board regulations, are also properly raised before the Loft Board. (*See* 29 RCNY § 2-02; Multiple Dwelling Law § 282-a. *See also Scaturro v F.J.H. Realty, Inc.*, Civ Ct, Kings County, Dec. 26, 2018, Kuzniewski, J., index no. 6082-18.)

While Respondents are incorrect that the claims are "mirror images" of each other, they need not be to warrant dismissal. Pursuant to CPLR 3211 (a) (4), a court may dismiss one action if a prior action is pending where there is "substantial identity of the parties and causes of actions" and the two actions are "sufficiently similar" and the relief sought is "the same or substantially the same." (*Simonetti v Larson*, 44 AD3d 1028, 1028-1029 [2d Dept 2007] [internal citations omitted]; *see White Light Prods., Inc. v On the Scene Prods.*, 231 AD2d 90 [1st Dept 1997].) Neither is Petitioner correct that the two proceedings are "disparate and unrelated." (NYSCEF Doc. 25, Price affirmation ¶ 26.) In fact, Petitioner states: "The instant Petition does re-request relief the same conditions to be repaired in the Petition [sic] as he did five years ago in the Application to the Loft Board." (NYSCEF Doc. 25, Price affirmation ¶ 27.) As the parties here all agree that the Loft Board has primary jurisdiction over grievances related to minimum housing standards (*see* NYSCEF Doc No. 6, Goldsmith affirmation ¶ 18; NYSCEF Doc No. 25, Price affirmation ¶ 15; NYSCEF Doc No. 18, Keblish affirmation ¶ 11) and a diminution of services action for correction of violations and harassment has previously been filed with the Loft Board and the court should "stay its hand" for the administrative agency's determination. (*See Schwartz v E. Ramapo Cent. Sch. Dist.*, 127 AD3d 763 [2d Dept 2015].) Accordingly, as to

those claims currently pending before the Loft Board, Petitioner has chosen his forum and the court will defer to the Loft Board for their adjudication.⁵

However, regarding the violations cited by HPD, which are not allegations in Petitioner's application before the Loft Board, the court agrees with Petitioner that they should be subject to an order to correct. Respondents have not successfully raised either prior action pending or primary jurisdiction as to these violations (as they are not part of the Loft Board application), or persuaded the court that only the Loft Board may hear these claims.

Much of Respondents' argument on this point relies on a recent decision in *Baer v 400 S. 2nd Realities, LP* (71 Misc 3d 1125 [Civ Ct, Kings County 2021]). In that case, the court opined that the Housing Maintenance Code was "inapplicable to and not enforceable in interim multiple dwellings" and thus dismissed an IMD tenant's HP proceeding after finding that "no statute that creates a cause of action for occupants of an interim multiple dwelling to seek a remedy for [violations of the Loft Board maintenance standards] in any court, including Housing Court." (*Id.* at 1126-1127, 1128.)

For the following reasons, this court disagrees with the *Baer* court's determination that the HMC is unenforceable in interim multiple dwellings. The court looks first to the plain language of the Code.

The Scope of the Housing Maintenance Code

In enacting the Housing Maintenance Code, the legislature found that "the enactment of a comprehensive code of standards for decent housing maintenance, imposing duties and responsibilities for the preservation of the dwellings in the city upon owners and tenants, as well as on the municipality itself, enforceable by a broad range of legal, equitable and administrative powers, is appropriate for the protection of the health, safety and welfare of the people of the city." (Housing Maintenance Code [Administrative Code of the City of NY] § 27-2002.) These concerns are equally applicable to tenants living in interim multiple dwellings. The provisions of the Code apply broadly "to all dwellings." (Housing Maintenance Code § 27-2003.)⁶ A

⁵ Petitioner's argument that "[c]onsidering the amount of time that elapsed, it is questionable whether the Loft Board will or has the authority to resolve the Application" is of no moment. (NYSCEF Doc No. 25, Price affirmation ¶ 29.)

⁶ The court is cognizant that the enactment of the Housing Maintenance Code predates the Loft Law by 15 years. (*Compare* LL 56/1967 with L 1982, ch 349.) Thus, to hold that the HMC does not apply to IMDs is to hold that New York City had no housing standards applicable to dwellings or residences in loft buildings from 1967 to 1982. Moreover, part of the impetus behind enactment of the Loft Law was the legislature's finding that loft buildings

“dwelling” is defined as “any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings.” (Housing Maintenance Code § 27-2004 [a] [3].)

Section 27-2091 of the Code grants HPD the “power to issue notices and orders to secure compliance with the requirements of this code, of the multiple dwelling law, and of other state and local laws that impose requirements on dwellings” along with the “power to issue an order to correct any underlying condition existing in a building that has caused or is causing a violation of this code, of the multiple dwelling law, or of other state and local laws that impose requirements on dwellings.”

Section 27-2115 (a) of the Code subjects any “person who violations any law related to housing standards to a civil penalty . . .” The term “person” is broadly construed as inclusive of “the owner, or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person, firm or corporation directly or indirectly *in control of a dwelling* or part thereof.” (Housing Maintenance Code § 27-2004 [a] [5] [emphasis added].)

Section 27-2115 (h) (1) of the Code provides:

“[I]f there is a notice of violation outstanding respecting the premises in which the tenant or group of tenants resides, or, if there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter, the *tenant or any group of tenants, may individually or jointly apply to the housing part for an order directing the owner and the department to appear before the court*... Nothing in this section shall preclude any person from seeking relief pursuant to any other applicable provision of law.”

As the language of the Code itself makes plain, HPD has the power to issue notices of violation “in a building,” and if violations of the HMC exist, then the owner “shall be” subject to civil penalties. Tenants, as well as HPD, are empowered to enforce housing maintenance standards by filing a Housing Part action in Housing Court seeking an order to correct Code violations. (Housing Maintenance Code § 27-2115 [h] [1].) The Loft Law did not specifically create exclusive jurisdiction in the Loft Board over all claims concerning housing maintenance

being used for residential purposes were “without compliance with local laws regarding minimum housing maintenance standards.” (Multiple Dwelling Law § 280.) A building or its owner could not be found to be out of compliance with a law or regulation to which they were never subject.

standards in interim multiple dwellings. (See *Matter of Commr. of Dept. of Hous. Preserv. & Dev. of City of N.Y.*, 131 Misc 2d 505, 508 [Civ Ct, NY County 1986] [finding that the Loft Law rules “do not . . . even begin to claim exclusivity in enforcement of the Housing Maintenance Code in IMDs.”].) Nothing in the Loft Law or the Housing Maintenance Code precludes a loft tenant from choosing to file in in one or the other forum.

A line of cases preceding *Baer* holds likewise. In *Commr. of Dept. of Hous. Preserv.*, the court denied an owner’s motion to dismiss a petition brought by HPD pursuant to Article 7-A of the RPAPL to appoint a public administrator where HPD had issued Code violations in a loft building. (*Id.* at 506.) The court rejected the owner’s argument that only the Loft Board had standing to bring a 7-A proceeding finding that “the functions of the Loft Board do not include the enforcement of the Housing Maintenance Code of New York City.” (*Id.* at 507 [internal quotation marks omitted].) Other courts have held that “HP proceedings are appropriately commenced by occupants of [interim multiple dwellings] seeking to correct violations.” (*Rivellini v Rolf*, 43 Misc 3d 1202[A], 2014 NY Slip Op 50445 [U], *3 [Civ Ct, NY County 2014]; see *Craine v Dorina Realty Corp.*, NYLJ, July 19, 2018 [Civ Ct, NY County 2019]; *Doukas v Pravada Bros. Realty Co.*, NYLJ, July 16, 1995, at 23, col 6, 1995 NYLJ LEXIS 9794 [Civ Ct, NY County 1995, Wendt, J.]. See also Hon. Gerald Lebovits and Linda Rzesniowiecki, *The New York Loft Law*, 28 NY Real Prop LJ 21, 23 [Spring 2010] [recognizing that “[a]n IMD tenant suffering from lack of services may file a diminution-of-services application with the Loft Board, which will then refer it to OATH for a hearing. The IMD tenant also has the option of filing an HP (Housing Part or repair) proceeding in Housing Court to compel an owner to correct violations.”].) The duty and jurisdiction to enforce the HMC falls on the Housing Court, which, at its inception, was “devoted to . . . the enforcement of state and local laws for the establishment and maintenance of housing standards, including . . . the Housing Maintenance Code.” (Civil Court Act 110 [a].)

Because the purpose of the doctrine of primary jurisdiction is to “co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective *the statutes with which both are concerned*” (*Capital Tel. Co., Inc. v Pattersonville Tel. Co., Inc.*, 56 NY2d 11, 22 [1982]), it is not applicable to Petitioner’s claims arising under the HMC not already properly before the Loft Board. (See *Missry v Ehlich*, 1 Misc 3d 723 [Civ Ct, NY County 2002].) Moreover, although the additional

repair conditions alleged here could be raised within the context of a diminution of services claim under 29 RCNY 2-04 (c), it cannot be said that primary administrative review is triggered here because the “the matters under consideration are inherently technical and peculiarly within the expertise of the agency,” in that Petitioner’s claims arise under the HMC which is a statute the Housing Court was created to enforce. (*Davis v Waterside Hous. Co., Inc.*, 274 AD2d 318, 31 [1st Dept 2000].)

Accordingly, Respondents’ motion is granted to the following extent and it is hereby:

ORDERED that insofar as the petition seeks an order to correct violations for conditions already raised before the Loft Board it is dismissed; and it is further

ORDERED that insofar as the petition seeks relief pursuant to section 27-2005 (d) of the Housing Maintenance Code (harassment) it is dismissed; and it is further

ORDERED that the Respondents shall correct HPD violations sequence numbers 14553083 and 14553071 within the statutory timeframes set forth in Housing Maintenance Code or be subject to civil penalties as mandated by the statute. The timeframes for compliance shall begin to run from the date that this decision and order is filed on NYSCEF. Any penalties shall accrue from the expiration of the time set for compliance until correction.

This constitutes the decision and order of this court.

Dated: New York, New York
January 20, 2022

So Ordered:



~~Hon. Karen May Bacdayan~~

HON. KAREN MAY BACDAYAN, JHC

The City of New York
 Department of Housing Preservation and Development
 Division of Code Enforcement

Open Violation Summary Report

For The Following Selected Criteria: From Date - All Through Date - All, Viol Hazard Code - All, Violation Order No. - All, Apt No. - 4R, Violation Category. - All

Building Location:			Building Profile:					
Address: 33	UNION SQUARE WEST	Range: 33-33	A Units: 18	Ownership/Prog: LOFT LAW	Last Insp Dt: 09/09/2021			
Boro: MANHATTAN	Zip: 10003	CD: 5	B Units: 0	Bldg Class: HERETOFORE CONVERTED CLA	ERP Repair Ind:			
Block: 00844	Lot: 0019	Census Tract: 5200	No. of Stories: 11		Last ERP: 00/00/0000			
			MDR #: 142129					

AKA

House No.	Street Name
33	UNION SQUARE WEST
33	UNION SQUARE WEST

HPD Registration Information

Owner Type	Last Valid Reg. Date	Organization	Last Name	First Name	Boro	House No.	Street Name	Apt.	City	State
Officer	05/31/2012	DECKER ASSOCIATES LLC	LABOZ	MAURICE	111	E 14TH ST	395	NEW YORK	NY	
Officer	05/31/2012	DECKER ASSOCIATES LLC	PUNCH	WILLIAM	111	E 14TH ST	395	NEW YORK	NY	
MANAGING AGENT	05/31/2012	REGAL REAL ESTATE LLC	PUNCH	WILLIAM	111	E 14TH ST	395	NEW YORK	NY	
LLC	05/31/2012	DECKER ASSOCIATES LLC	PUNCH	WILLIAM						

Story	Apt	Date Reported	Hazard Class	Order No	Violation Seq No	Item No	Violation Status	Status Dt	Certification Status	NOV Issue Dt	Cert Due Date	Cert Rcvd	Reinspect Dt
4	4R	09/09/2021	C	530	14553083		NOV SENT	09/13/2021	PENDING	09/13/2021	10/14/2021	00/00/0000	00/00/0000
<i>Viol Desc</i> § 27-2005, 2007, 204.1 HMC CODE: ARRANGE AND MAKE SELF-CLOSING THE DOORS ... IN THE ENTRANCE LOCATED AT APT 4R, 4th STORY, 1st APARTMENT FROM SOUTH AT WEST													
4	4R	09/09/2021	B	689	14553071		NOV SENT	09/13/2021	PENDING	09/13/2021	11/01/2021	00/00/0000	00/00/0000
<i>Viol Desc</i> § 27-2005, 2006, 2037 HMC: PROPERLY REPAIR AND ABATE UNSAFE ELECTRIC WIRING CONDITION CONSISTING OF EXPOSED ELECTRICAL WIRES AT CEILING IN THE BATHROOM LOCATED AT APT 4R, 4th STORY, 1st APARTMENT FROM SOUTH AT WEST													

Total Open Violations for the Bldg: 11 A=2 B=1 C=1 I=7 Other=0

Total Open Violations for the Bldg for the selected criteria: 2 A=0 B=1 C=1 I=0 Other=0

For The Following Selected Criteria: From Date - All Through Date - All, Viol Hazard Code - All, Violation Order No. - All, Apt No. - 4R, Violation Category. - All