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2020-02-13

### Richard Breslaw Family LP v NYC Dept. of Bldgs.

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**Richard Breslaw Family LP v NYC Dept. of Bldgs.**

2020 NY Slip Op 30440(U)

February 13, 2020

Supreme Court, New York County

Docket Number: 152499/2019

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

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

-----X

INDEX NO. 152499/2019

RICHARD BRESLAW FAMILY LP,

MOTION DATE 01/09/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

NYC DEPARTMENT OF BUILDINGS, THE CITY OF NEW YORK

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30

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

Upon the foregoing documents,

Petitioner, Richard Breslaw Family LP, brings this Order to Show Cause, pursuant to CPLR 78, compelling respondents, NYC Department of Buildings, and The City of New York, to remove all fines, penalties, and violations issued on the real property located at 612-614 11th Avenue, New York, New York 10036.

Petitioner entered into a lease agreement with Ryan D'Amato for the fourth-floor apartment on December 31, 2016. Petitioner entered into a new lease agreement with Ryan D'Amato for the fourth-floor apartment extending the lease for an additional two years, December 31, 2017 through December 31, 2019.

Petitioner entered into a lease agreement with Ryan D'Amato for the second-floor apartment on May 15, 2017. Petition states petitioner had no knowledge of Ryan D'Amato's intent to use both apartment for AirBNB (short term) rentals. Between October 2017 through Spring 2018, Ryan D'Amato began to rent both apartments for short term rentals through AirBNB. Between December 2017 through the present, respondents caused various violations, fines, and penalties to be issued against petitioner's building for a sum of \$87,000.

Petitioner received a visit from the New York Police Department toward the end of December 2017, regarding noise complaints and numerous people coming and going, in and out of the second and fourth floor

apartments. Petitioner states they requested Ryan D'Amato stop renting the apartment on AirBNB and has been taking necessary steps to evict Ryan D'Amato.

Petitioner alleges the NYC Department of Buildings and the statutes under which they operate do not support the issuance of violations based on law and equities; that the City of New York's refusal at the Office of Administrative Trial and Hearings ("OATH") to dismiss, remove, or reduce the violations was an arbitrary and capricious decision; and that respondents should be compelled to vacate the violations.

Chapter 26 of the New York City Charter empowers the Department of Buildings to enforce statutes, laws, and rules relating to the construction, alteration and maintenance of buildings or structures in the City of New York. Section 28-210.3 of the New York City Administrative Code sets forth the rules governing illegal conversions of dwelling units from permanent residences in the City of New York. The section 28-210.3 states, in pertinent part, "[i]t shall be unlawful for any person or entity... permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes." Administrative Code § 28-201.2.1(16), "a violation of section 28-210.3 that involves more than one dwelling unit or a second or subsequent violation of section 28-210.3 by the same person at the same dwelling unit" is classified as an immediately hazardous violation. Title 1 of the Rules of the City of New York § 102-01 sets forth three classes of violations. Administrative Code §28-301.1 states, "[t]he owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code."

The initial adjudication of a summons is before an OATH hearing officer, as promulgated in Title 48 of the Rules of the City of New York. The hearing officer's decision and order may be appealed administratively by filing an appeal within thirty days, per 48 RCNY § 6-19.

Petitioner received a November 30, 2017 summons and an April 5, 2018 summons charging petitioner with violations of the Administrative Code and the Building Code. OATH hearing officer Kathryn Roake held administrative hearings for the two summonses on January 18, 2018 and August 9, 2018 respectively, and imposed civil penalties of \$87,000.

On September 5, 2019, Michael Breslaw appealed OATH officer Kathryn Roake's decision which was denied because 35 days elapsed for appealing. Petitioner commenced the instant proceeding by Order to Show Cause on March 13, 2019, challenging the civil penalties.

One who objects to the act of an administrative agency must exhaust all available administrative remedies before being permitted to litigate in a court of law (see *Lehigh Portland Cement Co v NY State Dept of Envtl Conservation*, 87 NY2d 136, 140 [1995]). Per 48 RCNY § 6-19(a)(1)(iii), before appealing, petitioner was required to pay the penalties imposed on it by hearing officer Roake's Order. Petitioner failed to perfect an appeal of OATH hearing officer Roake's decision and order because petitioner did not submit proof of payment of the penalty imposed or a waiver from OATH of prior payment due to financial hardship.

As petitioner failed to exhaust all administrative remedies by not perfecting a proper and timely appeal, the Court finds this matter should be dismissed for lack of subject matter jurisdiction.

If the Court was considering the merits of said petition, the Court notes that petitioner alleges OATH's decision was arbitrary and capricious. In deciding whether an agency's determination was arbitrary, capricious, or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis has been found (see *Heintz v Brown*, 80 NY2d 998, 1001 [1992]). An action or determination is arbitrary if it was made without sound basis in reason and without regard to the facts (*id.* at 1001).

Petitioner represents it was the tenant who operated the subject premises as an illegal short-term rental of the two units within their property. This is not a defense to the violations charged in the 2018 summonses. Courts have also upheld a building owner's non-delegable responsibility to maintain its building in a code-compliant manner and found building owners vicariously liable for breaching this obligation (see *Guzman v Haven Plaza Housing Dev Fund Co*, 69 NY2d 559 [1987]).

Petitioner admits that as early as November 2017, when it was issued the November 2017 summons, that it was aware of the use of the subject premises for short-term rental. Petitioner waited four months to

commence eviction proceedings against the offending tenant and offered no proof that any of the violations had been corrected.

The subject premise is classified for permanent residence, and violations of the building code occurred when the apartments were illegally converted into short-term rental units as advertised on AirBNB. The hearing officers properly applied the appropriate building code violations and did not make an arbitrary nor capricious decision.

ADJUDGED that the application is DENIED and the petition is dismissed, with costs and disbursements to respondent.

2/13/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN
- DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: