FEA 6/10/15 fe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: KERN Justice

PART 55

FIONA CAMPBELL STONE, et al.

-v-

NEW YORK CITY LOFT BOARD, et al.

INDEX NO. 100534/14

MOTION DATE

MOTION SEQ. NO. 2

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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).

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

Dated: 6/10/15

CK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

FIONA CAMPBELL STONE, VLAD TEICHBERG, JASON BECKFORD, NICOLAI HAUPT, STEPHEN A. WESTBROOK, WILLIAN FOSTER, PETER ALEKSA and IL J. CHOI,

Petitioners,

Index No. 100534/2014

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY LOFT BOARD, THAMES ST. LOFTS LLC and THAMES HOLDINGS LLC,

Respondents.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2,3
Replying Affidavits	4
Exhibits	5

Petitioners brought the instant petition pursuant to the Civil Practice Law and Rules ("CPLR") § 3001 and Article 78 seeking to vacate, in part, an Order made by respondent the New York City Loft Board (the "Loft Board") regarding three applications filed with the Loft Board by various occupants of the buildings located at 13 and 15 Thames Street, Brooklyn, New York and for a declaratory judgment that the Loft Board violated the New York State Open Meetings Law. In response to the petition, the Loft Board initially cross-moved for an Order pursuant to CPLR § 3211(a)(2), (3), (7) and (10) dismissing the petition. By Decision/Order

dated September 9, 2014 (the "September Order"), this court granted the Loft Board's cross-motion in part, ordered that the subject buildings' current owners Thames St. Lofts LLC and Thames Holdings LLC (collectively referred to herein as the "Thames Respondents") be joined in the action and that the Loft Board answer petitioners' remaining claims within thirty days. Thereafter, the Thames Respondents also moved for an Order pursuant to CPLR § 3211(a)(1),(2), (3) and (7) dismissing petitioners' first through fourth causes of action based on this court's September Order. By Decision/Order dated April 1, 2015, this court denied the Thames Respondents' motion in its entirety and directed them to answer the petition. Thames Respondents have now answered. Thus, the court shall now turn to the merits of the petition and, for the reasons set forth below, the petition is granted in part and denied in part.

The relevant facts are as follows. Petitioners are residents in the buildings located at 13 and 15 Thames Street, Brooklyn, NY (the "buildings"). 13 Thames Street ("13 Thames") and 15 Thames Street ("15 Thames") are two "mirror image" buildings with similar architectural features, sharing a common wall and utilities, each located on a separate parcel of real property zoned for light manufacturing and that formerly was operated as a nut packing factory. The buildings are each three stories tall and there is one housing unit located on each floor of each building. The housing units located in 13 Thames are denominated 1W, 2W and 3W and the housing units located in 15 Thames are denominated 1E, 2E and 3E. Respondent Loft Board is a New York City agency created by Multiple Dwelling Law ("MDL") Article 7-C (the "Loft Law") that is responsible for administering the provisions of the Loft Law and that has the authority to adopt rules and regulations to implement those provisions.

On or about December 13, 2010, various tenants in the buildings, including petitioner Il J.

Choi (collectively referred to herein as the "Tenants"), filed an application with the Loft Board seeking a determination that: (1) 13 and 15 Thames constitute a horizontal interim multiple dwelling covered by the Loft Law pursuant to MDL § 281(5); (2) 13 and 15 Thames contain six units, three in each building, one on each of the first, second and third floors in both of the buildings; and (3) the applicants are protected occupants of their respective units, which was assigned Loft Board Docket Number TR-0842 ("TR-0842") (herein referred to as the "Coverage Application"). Thereafter, on April 21, 2011, petitioner Fiona Campbell Stone filed an application with the Loft Board seeking coverage rights for herself, petitioners Vald Teichberg, Jason Beckford, Nicolai Haupt, Stephen A. WestBrook, William Foster, Peter Aleksa and non-parties Bernard Walker and Arik MacAndreas ("Unit 1W Petitioners") as protected occupants of Unit 1W under the Loft Law, which was assigned Loft Board Docket Number TR-0889 ("TR-0889") (hereinafter referred to as the "Unit 1W Coverage Application").

On June 21, 2011, the buildings were sold. Specifically, 13 Thames was sold to 13 Thames Realty Inc. ("13 Realty") and 15 Thames was sold to 15 Thames Street Realty Inc. ("15 Realty"). Thereafter, on January 27, 2012, the Loft Board registered the buildings as two separate interim multiple dwelling ("IMD") buildings. Shortly after the buildings were registered as IMD buildings, on February 8, 2012, petitioners herein filed another application with the Loft Board seeking a finding that the buildings owners failed to comply with the legalization deadlines pursuant to MDL § 284(1) and § 2-01(a) of Title 29 of the RCNY, which was assigned Loft Board Docket Number TN-0220 ("TN-0220") (hereinafter referred to as the "Code Compliance Application").

On or about June 26, 2012, the Loft Board transferred the Code Compliance Application,

the Coverage Application and the Unit 1W Coverage Application to the Office of Administrative Trials and Hearings ("OATH"). OATH consolidated the three applications (collectively "the Applications") and assigned them to be heard by Administrative Law Judge John B. Spooner ("ALJ Spooner"). After the Applications had been transferred to OATH, on or about January 29, 2013, tenants of Units 1E, 2E, 3E and 2W entered into a Stipulation of Partial Settlement ("Stipulation I") with 13 Realty and 15 Realty in which the parties agreed that said tenants were protected occupants under the Loft Law of their respective units. Additionally, at the hearing before ALJ Spooner on February 1, 2013, the Unit 1W Petitioners and 13 Realty and 15 Realty stipulated that the Unit 1W Petitioners were protected occupants of Unit 1W ("Stipulation II"). Further, the parities stipulated that Bernard Walker and Arik MacAndreas's coverage claims, as part of the Unit 1W Coverage Application, would be dismissed without prejudice.

On February 22, 2013, the buildings were sold to yet another owner. Specifically, Thames Street Lofts, LLC ("Thames Lofts") purchased 13 Thames and Thames Holdings LLC ("Thames Holdings") purchased 15 Thames.

On March 6, 2013, ALJ Spooner issued a Report and Recommendation on the Applications and on March 21, 2013, he issued his Amended Report and Recommendation (the "Amended Report"). In the Amended Report, ALJ Spooner recommended that the Loft Board find: (1) the buildings are a horizontal multiple dwelling; (2) the 16 tenants named in Stipulation I and Stipulation II are protected occupants; and (3) the owners are not in compliance with the legalization deadlines, pursuant to MDL § 284(1), and are subject to fines.

While the Applications were pending in front of the Loft Board, on May 2, 2013, petitioners Jason Beckford, Peter Aleksa and Stephen A. Westbrook (collectively "Global

Plaintiffs") commenced an action against, *inter alia*, the City of New York, Michael Bloomberg, Raymond Kelly, Robert LiMandri, Ira Gluckman ("City Defendants") to challenge partial vacate orders that were issued by the Department of Buildings ("DOB") for the entire first floors of the buildings back in May of 2011, which still had not been lifted (hereinafter referred to as the ("Global Action"). Specifically, the vacate orders called for Unit 1W and 1E to be vacated "due [to] imminent danger to life or public safety." In their complaint, the Global Plaintiffs alleged that they owned and ran a media company, Global Revolution TV from the first floor of the buildings. In that action, the City Defendants moved to dismiss the action on the grounds that: (1) plaintiffs lacked standing; (2) plaintiffs were time-barred from challenging the Vacate Orders; and (3) plaintiff failed to state a cause of action for the alleged violations of their First, Fourth and Fourteenth Amendment rights. On March 14, 2014, the Honorable J. Jimenez-Salt granted the City Defendants' motion to dismiss. Global Plaintiffs appealed the decision and the case is currently pending before the Appellate Division, Second Department.

On January 13, 2014, the Loft Board notified all the affected parties, including petitioners herein, of its proposed order on the Applications (the "Proposed Order") that would be presented to the Loft Board for a final determination during its January 16, 2014 Board meeting. At the Board meeting, when the Loft Board reached the Proposed Order, the petition alleges that the acting chair declared that the Loft Board would convene in executive session to consider the Proposed Order because there existed "related litigation" between some of the affected parties and the Loft Board. One member of the Loft Board objected and forced a vote on the question. The Loft Board then passed a motion to convene in executive session to discuss and deliberate on the Proposed Order. Building security cleared Spector Hall where the meeting was being held

and the Loft Board met in executive session to deliberate on the Proposed Order. Upon completion of their deliberations, the executive session was adjourned and the public was allowed to return to Spector Hall for the conclusion of the public meeting. The Loft Board then voted to adopt Proposed Order in its entirety resulting in Loft Board Order Number 4225 (the "Order"). In the Order, the Loft Board accepted ALJ Spooner's findings that (1) the buildings are a horizontal multiple dwelling with six units; and (2) the buildings' owners are not in compliance with the code compliance deadlines set forth in MDL § 284. However, notwithstanding Stipulation II, the Loft Board did "not accept the finding that the First Floor Tenants [the Unit 1W Petitioners] are protected occupants of 13 Thames Street." Specifically, the Loft Board found that it could not accept the stipulation between the buildings' owners and the Unit 1W Petitioners that the Unit 1W Petitioners were protected occupants under the Loft Law as "the MDL expressly prohibits seven unrelated persons to maintain one unit as a common household." Thus, the Loft Board remanded the Unit 1W Coverage Application back to OATH for further findings of fact consistent with the Order. That application is still pending. Additionally, although the Loft Board also determined that the owners of the buildings failed to meet the code compliance deadlines, the Loft Board determined not to impose fines on the owners. Specifically, the Loft Board stated as follows:

> In their application the [Unit 1W Petitioners] who filed this application for failure to meet the code compliance deadlines did not seek fines. At the hearing, counsel for the [Unit 1W Petitioners] stated that "the entire reason we brought this application is to motivate the owner to restore the tenants to possession." Accordingly, the Loft Board will not impose fines at this time.

Petitioners now bring the instant hybrid Article 78 and declaratory judgment petition to challenge the right of the Loft Board to convene in executive session to consider the Proposed

Order and to challenge the Order to the extent it rejected the recommendation of ALJ Spooner that the Loft Board impose the maximum fine allowed by law for each violation of the code compliance timetable committed by the owner of the buildings and failed to adopt the recommendation that petitioners herein are covered occupants under the Loft Law. In this court's September Order, the portion of the petition challenging the denial of the Unit 1W Coverage Application was dismissed as premature. Thus, the court shall only discuss the remaining portions of the petition concerning whether the Loft Board improperly met in executive session and whether the Board's determination not to impose fines on the owner of the buildings was arbitrary and capricious.

As an initial matter, the court finds that the Loft Board improperly met in executive session in violation of the Open Meetings Law. Article 7 of the New York Public Officers Law ("POL") is also known as the "Open Meetings Law." The Open Meetings Law allows "citizens of this state [to] be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." POL § 100. At the same time, "executive sessions' are portions "of a meeting not open to the general public." POL § 102(3). The Open Meetings Law prohibits public bodies from conducting business in executive session outside the view of the public. *Matter of Lancaster v. Vil. of Freeport*, 22 N.Y.3d 30, 40 (2013). However, an exception exists for "discussions regarding proposed, pending or current litigation." POL § 105(1)(d); 29 RCNY § 1-03(f). The purpose of the foregoing exception is "to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings." *Matter of Jefferson Val. Mall (Concerned Citizens to Review) v. Town Bd. Of Town of Yorktown,*

83 A.D.2d 612, 613 (2nd Dept 1981). It is not to "be construed to shield private discussions between a public body and a private litigant from the general requirement that 'public business be performed in an open and public manner.'" *Id.* (quoting POL § 95). Additionally, a public body may meet in executive decision for deliberation in quasi-judicial proceedings. *See* POL § 108(1); 29 RCNY § 1-03(f).

In the present case, the Loft Board violated the Open Meetings Law on January 16, 2014, when it went into executive session to discuss the petitioners' various Loft Board applications as such discussion did not concern proposed, pending or current litigation. On January 16, 2014, when it came to the final agenda item on its master calendar concerning the Proposed Order, the Loft Board voted to convene in executive session to consider the Proposed Order upon the stated ground that there was "related litigation." At that time the Loft Board did not identify the "related litigation." However, on the instant petition, the Loft Board contends that it was referring to the Global Action, which involved some of the petitioners herein. Even assuming, *arguendo*, that the Global Action was "related" to the Proposed Order, the court finds that such fact still does not provide a proper ground for the Loft Board to convene in executive session during the meeting as the only matter up for discussion at the meeting was the acceptance or rejection of the Proposed Order, not any consideration or discussion whatsoever on the Global Action. Indeed, the Open Meetings Law is clear that an executive session can only be convened to discuss the current litigation. It does not, conversely, allow an executive session to be held merely because there may be related litigation on the subject to be discussed at the meeting.

Further, to the extent the Loft Board contends for the very first time in opposition to the present petition that it did not violate the Open Meetings Law as it convened in executive session

for deliberation in quasi-judicial proceedings, such contention is without merit as such reason was not stated during the meeting where the sole reason given for convening in executive session was that there was "related litigation." As such, the court will not consider this argument.

However, notwithstanding the foregoing, the court finds that petitioners have failed to demonstrate good cause to annul the Loft Board Order or for an award of attorney's fees based on the violation of the Open Meetings Law. It is well settled that not every violation of the Open Meetings Law triggers a sanction. *See* 2 N.Y. Jur. 2d Administrative Law § 91. Rather, "the burden is on the challenger to show good cause warranting such judicial relief." *Id.*; *see also In the Matter of New York Univ. v. Whalen*, 46 N.Y.2d 734, 735 (1978). "[P]urely technical and nonprejudicial infractions or wholly unintentional violations do not rise to the level of supporting an award of [sanctions]." *Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124, 127-128 (1995) (internal citations omitted); *see also Matter of Lancaster*, 22 N.Y.3d at 40; *Matter of Addesso v. Sharpe*, 44 N.Y.2d 925, 926-27 (1978). On the other hand, evidence that "a defendant has repeatedly violated the Open Meetings Law is certainly the kind of evidence that may justify an award of [sanctions]." *Matter of Gordon*, 87 N.Y.2d at 128 (citing *Matter of Orange County Publs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 45 N.Y.2d 947 (1978)). Here, petitioners have failed to present any evidence that the Loft Board's violation of the Open Meetings Law was intentional. Instead, the Loft Board's violation seems to have been a technical infraction based on the Board's misunderstanding of the scope of the exceptions to the Open Meetings Law ban on convening in executive session. Moreover, there is no evidence that the Loft Board has repeatedly violated the Open Meetings Law. Thus, the court finds that no sanctions are warranted for the Loft Board's violation of the Open Meetings Law at

this time and the portion of the petition seeking such relief is denied.

However, the portion of the petition seeking to annul the Loft Board's determination not to impose fines on the buildings' owner on the ground that it is arbitrary and capricious is granted. On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dept 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2nd Dept 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) ("Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the present case, the court finds that the determination to not impose fines on the buildings' owner was arbitrary and capricious, irrational and without foundation in fact. During the OATH hearings, petitioners' attorney stated that "the entire reason [petitioner] brought this application is to motivate the owner to restore the tenants to possession." Based on this statement, the Loft Board determined not to impose fines on the buildings' owner on the ground that petitioner did not request fines. This conclusion is without a rational basis. As an initial matter, the statute and regulations governing the Loft Law provide for discretionary fines as the

principal enforcement mechanism for any violation of the code compliance timetable. *See* MDL § 282 ("The violation of any rule or regulation promulgated by the [Loft Board] shall be punishable by a civil penalty determined by the loft board."); 29 RCNY 2-01(c)(2) ("An owner who is found by the Loft Board to have violated the code compliance timetables . . . may be subject to a civil penalty"); 29 RCNY 2-11.1 (setting forth civil penalty amounts for violating code compliance deadlines"). As such, a request that the Loft Board impose the civil penalties provided for by law is implicit in every code compliance timetable violation application as the imposition of fines is the only way for a tenant to get an owner to comply with the timetables and get the building into compliance. Indeed, without the imposition of fines any finding that an owner violated the code compliance timetables is rendered meaningless. Moreover, the fact that petitioners' attorney stated that petitioners sole motive for bringing the application was to "motivate the owner to restore the tenants to possession" is not in anyway inconsistent with petitioners' desire to impose fines. The fines serve as a motivator for the owner to make the necessary repairs and renovations to get the buildings into compliance with the Loft Law. The necessary result of bringing the buildings into compliance is that the conditions mandating the vacate order would be cleared. Thus, as the petitioners are currently out of possession due to the vacate order, there is a direct connection between the imposition of fines and petitioners' goal of restoring the petitioners to possession. Simply put, it is clearly arbitrary and capricious for the Loft Board to refuse to impose the fines authorized by law against an owner found after a hearing to have failed to comply with the legally mandated code compliance timetable based solely on the fact that petitioners' primary desire was to be restored to possession.

Based on the foregoing, it is hereby

ADJUDGED that the petition is granted to the extent that the determination of the Loft Board not to impose fines on the buildings' owner is vacated and annulled and the matter is remanded back to the Loft Board to reconsider the issue in accordance with this decision; and it is further

ADJUDGED and DECLARED that the Loft Board violated the Open Meetings Law on January 16, 2014 when it convened in executive session; and it is further

ORDERED that the petition is otherwise denied. This constitutes the decision, order and judgment of the court.

Dated: 6/10/15

Enter: _____
J.S.C.

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).