

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

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In the Matter of the Application of

Letitia James as the Public Advocate
for the City of New York; Constance Taylor;
Odalis Polanco; and Arlene Riley

INDEX NO.

Petitioners,

For Judgment Pursuant to Article 78
of the Civil Practice Law & Rules and
Declaratory Judgment

-against-

New York City Housing Authority;
and Shola Olatoye, CEO, in her official capacity,

Respondents.
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**MEMORANDUM OF LAW IN SUPPORT
OF ORDER TO SHOW CAUSE**

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**MEMORANDUM OF LAW IN SUPPORT
OF ORDER TO SHOW CAUSE**

Petitioners, Letitia James, as the Public Advocate for the City of New York, Constance Taylor, Odalis Polanco, and Arlene Riley submit this Memorandum of Law in support their Order to Show Cause against Respondents, New York City Housing Authority (“NYCHA”) and Shola Olatoye, NYCHA CEO, seeking judgment pursuant to Article 78 of the Civil Procedure Law and Rules (“C.P.L.R.”), declaratory relief pursuant to C.P.L.R. § 3001, and a preliminary injunction pursuant to C.P.L.R. Article 63.

PRELIMINARY STATEMENT

Petitioners seek an order pursuant to Article 78 of the C.P.L.R. and a declaratory judgment pursuant to C.P.L.R. § 3001 that Respondents are violating Administrative Code § 27-

2029 and New York City Health Code § 131.07 and that Respondents must immediately provide heat to Petitioners consistent with these provisions. Petitioners also seek a preliminary injunction enjoining Respondents from failing to provide heat in accordance with the applicable heating provisions.

Administrative Code § 27-2029 and New York City Health Code § 131.07 mandate the *minimum* outdoor temperatures at which heat must be provided between October 1st and May 31st. An inside temperature of at least 68 degrees must be maintained between the hours of 6:00 a.m. and 10:00 p.m. whenever the outside temperature falls below 55 degrees, and an inside temperature of at least 55 degrees must be maintained between the hours of 10:00 p.m. and 6:00 a.m. whenever the outside temperature falls below 40 degrees. Respondents' conduct and internal heating policy evidence a clear intent to evade these legal requirements. Upon information and belief, NYCHA's policy is to shut off overnight heat unless and until outside temperatures fall below 20 degrees. Respondents' conduct endangers the lives of all the residents in the buildings it operates and threatens to exacerbate the medical ailments of tenants. Respondents' policy regarding when they provide heat is a clear violation of the law and must be revised immediately.

Petitioners also seek discovery from Respondents pursuant to C.P.L.R. § 408 about Respondents' internal policies and procedures relating to when heat is provided. This information is critical in order to determine the extent of Respondents' violations of the applicable heating provisions.

STATEMENT OF FACTS

New York City often experiences cold autumns and winters. The average low temperature for New York in October, November, December January and February are 47°, 38°, 38°, 38°, and 38° respectively.

28°, 23°, and 24° Fahrenheit, respectively.¹ Since October 1, 2015, the ambient temperature has dropped below fifty-five degrees between six a.m. and ten p.m. and below forty degrees between ten p.m. and six a.m. on many occasions, triggering a legal requirement to provide heat.² NYC Admin. Code § 27-2029. This December, the ambient temperature is expected to be below 55° on many days.³

Statutory Requirements

Under the applicable statutory provisions, NYCHA must provide heat when certain conditions are met. Administrative Code § 27-2029 provides, “Minimum temperature to be maintained,” states as follows:

- a. During the period from October first through May thirty-first, centrally-supplied heat, in any dwelling in which such heat is required to be provided, shall be furnished so as to maintain, in every portion of such dwelling used or occupied for living purposes: 1) between the hours of six a.m. and ten p.m., a temperature of at least sixty-eight degrees Fahrenheit whenever the outside temperature falls below fifty-five degrees; and 2) between the hours of ten p.m. and six a.m., a temperature of at least fifty-five degrees Fahrenheit whenever the outside temperature falls below forty degrees.

The New York City Health Code contains identical requirements. Health Code § 131.07(c) provides that “the minimum temperatures required by subdivision (a) of this section shall be maintained as follows:”

- (1) In a dwelling, during the months between October first and May thirty-first between the hours of six a.m. and ten p.m.: a temperature of at least 68 degrees F when the outside temperature falls below 55 degrees F (12.78 degrees C) and during the hours between 10 p.m. and 6 a.m. a temperature of at least 55 degrees F (12.78 degrees C) whenever the outside temperature falls below 40 degrees F (4.44 degrees C);

1 Historical average temperatures, New York City, available at www.intellicast.com/Local/History.aspx?location=USNY9472

2 <http://www.accuweather.com/en/us/new-york-ny/10007/month/349727?monyr=11/01/2015>

3 <http://www.accuweather.com/en/us/new-york-ny/10007/month/349727?monyr=12/01/2015>

NYCHA's Illegal Heating Policy

On November 25, 2015, counsel for certain NYCHA tenants involved in a separate housing action against NYCHA sent an email to NYCHA counsel, alerting NYCHA that, after weeks of failure to provide heat when external temperatures required it, NYCHA had briefly turned on the heat in the tenants' buildings, then shortly thereafter turned the heat off again. Affirmation of Satyam N. Bee, dated December 14, 2015 ("Bee Aff.") at Ex. A. NYCHA was informed that tenants were experiencing extreme cold and discomfort. *Id.*

Counsel for NYCHA responded in an email dated November 25, 2015, forwarding a communication for the Director of NYCHA's Heating Services Department, which stated that "NYCHA *official policy* and DOH requirement is heat shut off between 10 p.m. and 5 a.m. when the outside temps are above 20 degrees. When the outside temperature falls below 20 degrees heat is given through the night." (emphasis added). *Id.*

The improper NYCHA policy is not limited to nightly heating. As demonstrated by NYCHA maintenance personnel's statement to Petitioner Odalis Polanco, the daytime heating policy of providing no heat unless the external temperature is below 50 degrees similarly fails to meet the requirements of the Administrative and Health Codes. Affidavit of Odalis Polanco, dated December 15, 2015 ("Polanco Aff.") ¶ 6.

NYCHA acts as the landlord for Petitioners residential units and accordingly must comply with the applicable laws regarding the provision of heat. NYCHA itself concedes, in its own tenant handbook, that it is bound to provide heat pursuant to the temperature restrictions in these statutes.⁴ However, based on the foregoing, NYCHA heating policy is in direct contravention of Administrative Code § 27-2029, and New York City Health Code §131.07.

⁴

See page 34 of NYCHA's 2014 Handbook for Residents at <http://www1.nyc.gov/assets/nycha/downloads/pdf/nycha-tenant-handbook-2014.pdf>.

NYCHA's Failure to Provide Adequate Heat

Despite the requirements of NYC Administrative Code § 27-2029 and New York City Health Code § 131.07(c), NYCHA has failed to provide adequate heat, both historically and in the current 2015-2016 heat season. The experience of the Petitioners, described below, is representative of this chronic failure, which is the result of NYCHA's illegal heating policies.

Petitioner Constance Taylor is a 62 year-old disabled woman who has lived in Apartment 4B of 74-76 West 103rd Street her entire life. Affidavit of Constance Taylor, dated December 15, 2015, ("Taylor Aff.") ¶¶ 1-2. Over the course of the last 10 years, Petitioner Taylor and others in her building have noticed that NYCHA providing heat later and later in the heating season, even when external temperatures are well below the statutory minimums. Taylor Aff. ¶ 3. This historical pattern has continued this year. In five of the eight days starting Monday, November 23, 2015, the daily high and low temperature in Petitioner Taylor's area were not above 50° and 40° Fahrenheit, respectively.⁵ During this time NYCHA provided essentially no heating—the heating system was started on only one of these days. Taylor Aff. ¶ 5. Heat was never provided after 10:00 p.m., despite the extreme low temperatures during this time. Taylor Aff. ¶ 4.

Petitioner Taylor states that heat remained intermittent through December 10, 2015, despite the continued cold, and the temperature of her apartment often falls below the statutory minimums. Taylor Aff. ¶ 4. As a result, Petitioner Taylor and others are at a greatly elevated risk of harm from carbon monoxide poisoning and accidental fire.

⁵ Historical New York City temperature information available at www.wunderground.com/history/airport/KNYC/2015/11/22/DailyHistory.html?req_city=New%20York&req_state=NY&req_statename=New%20York&reqdb.zip=10036&reqdb.magic=1&reqdb.wmo=99999.

Charles Cordrey lives in the Marble Hill Houses at 5210 Broadway, Apartment 13 E, New York, NY 10463. Affidavit of Charles Cordrey, dated December 8, 2015 (“Cordrey Aff.”)

¶ 1. Mr. Cordrey has not had heat since February 2015. Cordrey Aff. ¶ 3. The lack of heat has exacerbated his medical conditions, which include chronic asthma and a lumbar spine. Cordrey Aff. ¶ 1. Due to the lack of heat, Mr. Cordrey was forced to seek treatment at the hospital for his chronic asthma. Cordrey Aff. ¶ 9.

Petitioner Odalis Polanco has lived with her three children at the Patterson Houses at 2615 3rd Avenue, Apartment 2D, New York, NY for about seven years. Polanco Aff. ¶ 1. Petitioner Polanco has had problems with the heat since she moved into her apartment. Polanco Aff. ¶ 2. A few months ago, NYCHA admitted to Petitioner Polanco that the boiler for the Patterson Houses was broken. Polanco Aff. ¶ 4. Petitioner Polanco has not had heat for several months. When Petitioner Polanco complained about the lack of heat, someone from the complex’s maintenance department explained that they turn the heat off between 10 p.m. and 6 a.m. and that during the day, the heat is only turned on if the outside temperature is below fifty degrees. Polanco Aff. ¶ 6. The lack of heat has allowed water to condense on her walls, causing mold to grow on the walls and floors of her apartment. Polanco Aff. ¶ 8.

Petitioner Arlene Riley has lived in the Taft Houses at 1365 Fifth Avenue, Apartment 13H, New York, NY for ten years. Affidavit of Arlene Riley, dated December 10, 2015, (“Riley Aff.”) ¶ 1. Petitioner Riley’s apartment has not had any heat in it all year. Riley Aff. ¶ 3. Petitioner Riley lives with her twenty-year old son, whose chronic asthma is exacerbated by the cold. Riley Aff. ¶¶ 1-2. Petitioner Riley suffers from rheumatoid arthritis, which has been so bad this year due to the cold that she sought a transfer from her apartment. Riley Aff. ¶ 2. Petitioner Riley recorded the temperature at her apartment around 10:00 p.m. from December 6,

2015 through December 9, 2015. Riley Aff. ¶ 5. The temperature during those times was well below the statutory minimums provided by the Administrative and Health Codes. *Id.*

ARGUMENT

I. PETITIONERS SEEK A DECLARATORY JUDGMENT THAT RESPONDENTS HAVE VIOLATED ADMINISTRATIVE CODE § 27-2029 AND NEW YORK CITY HEALTH CODE §131.07 AND THAT RESPONDENTS SHOULD PROVIDE HEAT IMMEDIATELY.

Petitioners seek a declaratory judgment pursuant to C.P.L.R. § 3001 that Respondents have violated Administrative Code § 27-2029 and New York City Health Code §131.07 and should immediately begin providing heat in accordance with these requirements. C.P.L.R. § 3001 authorizes “courts to declare ‘the rights and other legal relations of the parties to a justiciable controversy,’ providing a procedure for parties to resolve disputes over existing rights and obligations.” *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 355 (2004) (citations omitted). A justiciable controversy is “defined as a ‘real dispute between adverse parties, involving substantial legal interests for which a declaration of right will have some practical effect.’” *Palm v. Tuckahoe Union Free Sch. Dist.*, 95 A.D.3d 1087, 1089 (2d Dep’t 2012) (citations omitted). A declaratory judgment action requires that the parties have an actual controversy and a stake in the outcome. *Long Is. Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep’t 2006). Declaratory judgments resolve disputes where a “plaintiff is ‘unable to find among the traditional kinds of action one that will enable her to bring it to court.’” *Thome v. Alexander & Lousia Calder Found.*, 70 A.D.3d 88, 100 (1st Dep’t 2009) (citations omitted).

Here, a declaratory judgment would provide Petitioners with the necessary relief they seek—a judgment that Respondents must comply with the law and turn on the heat when required. A justiciable controversy clearly exists. Respondents dispute that they must provide heat in accordance with the applicable provisions of the Administrative Code and the New York

City Health Code while Petitioners insist that the law must be followed. Respondents' conduct demonstrates a deliberate pattern of not providing heat in multiple locations it operates. *See, e.g.,* Cordrey Aff. ¶ 3; Polanco Aff. ¶ 2. Respondents' internal heating policy indicates that their conduct is intentional and does not comply with the law.

A declaration that Respondents have violated the applicable heating provisions and directing them to provide heat to Petitioners as required by the Administrative and Health Codes will have practical effect. It will ensure that Respondents provide the statutorily required heat during the upcoming winter months. Petitioners will not be forced to endure the dangerous conditions associated with having no heat when temperatures drop below freezing.

Petitioners cannot readily challenge Respondents' heating policy through other sorts of actions, nor can lack of heat be adequately remedied by seeking monetary damages. As such, C.P.L.R. § 3001 provides Petitioners with the ideal action to declare that Respondents' policies violate the law and must be remedied immediately.

II. PETITIONERS SEEK A PRELIMINARY INJUNCTION THAT RESPONDENTS BE ENJOINED FROM REPEATED VIOLATIONS OF APPLICABLE HEATING PROVISIONS WHEN RESPONDENTS FAIL TO PROVIDE HEAT

Petitioners seek a preliminary injunction in order to prevent further violations of Administrative Code § 27-2029 and New York City Health Code §131.07 until the Court can determine the ultimate relief in this matter. In order to obtain a preliminary injunction, petitioners must show that 1) they have a likelihood of prevailing in the proceeding, 2) they will suffer irreparable harm if the relief is not granted and 3) the balance of equities favors injunctive relief. *W.T. Grant Co., v. Srogi*, 52 N.Y.2d 496, 517 (1981). The decision to grant a preliminary injunction "rests in the sole discretion of the Supreme Court." *Ruiz v. Meloney*, 26 A.D.3d 485, 486 (2d Dep't 2006).

In determining the likelihood of success on the merits, “the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action.” *1234 Broadway LLC v. West Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep’t 2011). The party seeking preliminary injunction need not provide conclusive evidence, but must demonstrate a clear right to the desired relief. *Id.* at 39-40.

Here, Petitioners have presented unambiguous evidence that Respondents are violating Administrative Code § 27-2029 and New York City Health Code §131.07. Respondents’ heating policy provides that they will not provide heat during the day unless it is below fifty degrees Fahrenheit. Polanco Aff. ¶ 6. Heat will not be provided at night unless temperatures drop below twenty degrees Fahrenheit. This policy ignores the requirements specified in Administrative Code § 27-2029, and New York City Health Code §131.07.

Respondents have also demonstrated a pattern of failing to provide heat. *See, e.g.*, Cordrey Aff. ¶ 3; Polanco Aff. ¶ 2. This conduct makes it clear that they have no intention of complying with the law. Petitioners have a strong likelihood of succeeding in an Article 78 proceeding.

Petitioners can also demonstrate that they will suffer irreparable harm if the preliminary injunction is not granted. Without heat, Petitioners will face dangerous living conditions. Petitioners are entitled to a preliminary injunction because their harm from lack of heat is not calculable and damages could not be readily determined at the underlying hearing. *OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348, 348 (1st Dep’t 2007); *see also J.O.M. Corp. v. Dep’t of Health of State of N.Y.*, 173 A.D.3d 153, 154 (1st Dep’t 1991) (“monetary harm which can be compensated by damages does not constitute irreparable injury.”).

Finally, a balancing of the equities clearly favors the Petitioners' request for a preliminary injunction. Respondents have no readily identifiable basis for failing to provide heat. On the other hand, Petitioners need the assurance that heat will be provided as winter approaches. Respondents will not be forced to take drastic actions or perform functions beyond the scope of their normal duties. Respondents must simply provide heat to the residents of the buildings they operate.

III. PETITIONERS SEEK DISCOVERY PURSUANT TO C.P.L.R. § 408 REGARDING RESPONDENT'S HEATING POLICIES

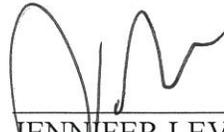
In an Article 78 proceeding, a petitioner can seek discovery only through leave of court pursuant to C.P.L.R. § 408. *Town of Pleasant Valley v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15 (2d Dep't 1999). "Discovery is granted only where it is demonstrated that there is a need for such relief." *Id.* A trial court has broad discretion to grant discovery requests, but must "balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." *Id.* at 16. In the absence of opposing interests, "any discovery that is relevant to the controversy at issue qualifies as material and necessary and should be allowed." *Id.*

Petitioners seek all documents relating to Respondents' heating policies and procedures and to conduct a deposition of the Director of the Heating Management Services Department, Robert Knapp. This information is clearly relevant to the controversy at issue. These documents and this limited deposition are necessary to help determine the scope of Respondent's policies and the extent of Respondents' violations of the applicable heating provisions throughout all the buildings operated by Respondents. Producing these documents and submitting to this one deposition would not be unduly burdensome, prejudicial, or violate confidentiality. The Court should grant Petitioners' request for discovery pursuant to C.P.L.R. § 408.

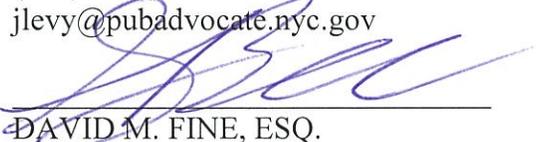
CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' application and issue and Order 1) declaring that Respondents have violated Administrative Code § 27-2029, and New York City Health Code §131.07, and must provide heat immediately; 2) granting a preliminary injunction enjoining Respondents from future violations of Administrative Code § 27-2029, and New York City Health Code §131.07 by directing them to provide heat when required by law; 3) directing that Respondents submit to limited discovery; and 4) grant such further relief as is appropriate and warranted.

Dated: New York, New York
December 15, 2015



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