

**Matter of 925 D Realty LLC v New York State Div. of  
Hous. & Urban Renewal**

2009 NY Slip Op 31759(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 103303/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART Part 5

Justice

Index Number : 103303/2009

**925 D REALTY LLC**

vs.

**NEW YORK STATE D.H.C.R.**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2, 3, 4

5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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Dated: 8/4/09

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of  
925 D REALTY LLC,

Index No.  
103303/09

Petitioner,

**UNFILED JUDGMENT**  
**DECISION**  
**ORDER**  
*This judgment has not been entered by the County and  
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appear in person at the Judgment Clerk's Desk (Room  
141B)*

NEW YORK STATE DIVISION OF HOUSING  
AND URBAN RENEWAL

Respondents.

Mot. Seq. 001

-----X

HON. EILEEN A. RAKOWER:

Petitioner 925 D Realty LLC (“Petitioner”) brings the instant Article 78 petition seeking an order from the court annulling the January 14, 2009 decision of respondent New York State Division of Housing and Community Renewal (“DHCR”) which denied Petitioner’s application for a major capital improvements (“MCI”) rent increase for upgrading an elevator in the building owned by Petitioner.

Petitioner is the owner of a building located at 925 West End Avenue in the City, County, and State of New York (“the building”). At all times relevant to the instant petition, the building consisted of apartments which are subject to the New York Rent Stabilization Law and applicable State regulations in the Rent Stabilization Code; as well as the New York City Rent and Rehabilitation Law and Rent and Eviction Regulations. Pursuant to these statutes and regulations, the owner of a rent stabilized apartment building may raise the rent charged to reflect MCI’s made to the subject building under certain circumstances and subject to certain limitations. Of particular relevance to the instant petitioner, 9 NYCRR §2522.4 provides

Adjustment of legal regulated rent

- (a) Increased space and services, new equipment, new furniture or furnishings; major capital improvements; other adjustments.

- (2) An owner may file an application to increase the legal regulated rents of the building or building complex on forms prescribed by the DHCR, on one or more of the following grounds:
- (i) There has been a major capital improvement, including an installation, which must meet all of the following criteria:
    - (a) deemed depreciable under the Internal Revenue Code, other than for ordinary repairs;
    - (b) is for the operation, preservation and maintenance of the structure;
    - (c) is an improvement to the building or to the building complex which inures directly or indirectly to the benefit of all tenants, and which includes the same work performed in all similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DHCR that certain of such similar components did not require improvement; and
    - (d) the item being replaced meets the requirements set forth on the following useful life schedule, except with DHCR approval of a waiver, as set forth in clause (e) of this subparagraph....

The useful life schedule contained in this regulation provides for a twenty-five year life span "major upgrades" for elevators.

Although §2522.4 only allows a subject property owner to increase rent to reflect major upgrades to an elevator, or replacement of its controllers and selector, clause (c) of that same provision provides as follows:

- (1) An owner who wishes to request a waiver of the useful life requirement set forth in clause (d) of this subparagraph must apply to the DHCR for such waiver prior to the commencement of the work for which he or she will be seeking a major capital improvement rental increase. Notwithstanding this requirement, where the waiver requested is for an item being replaced because of an emergency, which causes the building or any part thereof to be dangerous to human life and safety or detrimental to health, an

owner may apply to the DHCR for such waiver at the time he or she submits the major capital improvement rent increase application.

In short, the owner of a building subject to the Rent Stabilization Code is entitled to seek additional rent for an MCI for elevator upgrading. An owner who successfully applies for an MCI rent increase cannot increase rent based upon a subsequent elevator upgrading for a period of twenty-five years, unless the owner obtains a waiver from DHCR. In order to obtain a waiver, an owner must apply for the waiver prior to undertaking the work; or, in the case of an emergency, simultaneously with the owner's submission for an MCI rent increase application.

On January 31, 2007, Petitioner filed an application with DHCR to increase its rent based upon a claimed installation of an MCI in the form of elevator upgrading and related fees. Petitioner claims that the cost of the improvements were in excess of \$200,000. On October 25, 2007, DHCR's Rent Administrator ("RA") denied Petitioner's application on the grounds that the useful life of prior elevator upgrading had yet to expire, citing the fact that the building's prior owner of the building had its application for an MCI rent increase approved by DHCR in 1993 for elevator upgrading the previous year ("the prior upgrading"). Apparently, Petitioner was unaware of the prior upgrading until it received the RA's decision.

Petitioner filed a Petitioner for Administrative Review ("PAR") of the RA's 10/25/07 decision. Petitioner argued in its PAR that, had DHCR inquired why it was not seeking a waiver of the twenty-five year useful life period, Petitioner would have been able to demonstrate its entitlement thereto. Petitioner also argued that, since the work performed on the elevator was so substantially different from the prior upgrading, the 1993 increase had no bearing on Petitioner's application.

On January 14, 2009, DHCR denied Petitioner's PAR in an Order and Opinion by Deputy Commissioner Leslie Torres. DHCR affirmed the RA's decision on the grounds that Petitioner's upgrading of the elevator was made within the twenty-five year useful life period of the prior upgrading, and thus a waiver of the useful life period was required. In her decision, Deputy Commissioner Torres noted that Petitioner failed to request a waiver either prior to having the improvements made, or simultaneously with Petitioner's application (Torres also found that Petitioner "did not submit a waiver request with the MCI application based upon an emergency"). In denying Petitioner's PAR, Deputy Commissioner Torres found Petitioner's arguments

that (1) DHCR should have inquired as to whether Petitioner wanted to seek a waiver; and (2) that no waiver was necessary based upon the substantial differences in the prior upgrading and current upgrading, both unavailing.

Petitioner subsequently commenced this Article 78 proceeding by filing a verified petition. Annexed to the petition as exhibits are DHCR's 1/14/09 Order and Opinion; the RA's 10/25/07 decision; Petitioner's PAR; a 1990 filing with the Department of Buildings concerning the need for an elevator upgrade; DHCR's 1993 decision granting the prior building owner's application for an MCI rent increase based upon elevator upgrades; a copy of the contract pertaining to the current elevator upgrading; a 11/26/07 letter from New York Elevator stating that the current elevator upgrading was necessary; and a request for additional information dated 11/11/06 from DHCR to Petitioner.

DHCR has submitted a verified answer, affirmation in opposition, and memorandum of law. Annexed to the affirmation as exhibits are a copy of the Hon. Marilyn Shafer's decision in *Eastern Pork Products v. DHCR*, Index No. 10195/08 [Sup. Ct. N.Y. Cty. 2008]; orders denying an MCI rent increase and a PAR in another matter; and the 1/14/09 Order and Opinion. In addition, DHCR submits the Administrative Return pertaining to Petitioner's MCI application.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Here, a rational basis clearly exists for DHCR's denial of Petitioner's application. An application for an MCI rent increase for elevator upgrading in the subject building was granted in 1993, when the building was under different

ownership. Accordingly, the owner of the building is not entitled to an MCI rent increase for elevator upgrading until 2018 (twenty-five years after the prior upgrade), *unless* the owner applies for and obtains a waiver of the useful life period. To do this, Petitioner was required to apply for a waiver *before* undertaking the current elevator upgrading. That Petitioner was apparently unaware of the prior upgrading does not excuse Petitioner from its obligations under the Rent Stabilization Code. Petitioner was free to obtain all records of improvements made by the prior owner. Indeed, Petitioner did just that, albeit after the RA's denial of its application.

Equally unavailing is Petitioner's argument that a waiver was not required because the nature of the current elevator upgrading was much greater in scope than the prior upgrading. While this might have been a compelling argument for granting Petitioner a waiver had it timely applied for one, the Rent Stabilization Code provides that, unless a waiver is obtained, the useful life span of a "major upgrade" to an elevator is twenty-five years. Accordingly, the 1993 MCI rent increase precludes an additional MCI rent increase for the current upgrading.

Wherefore, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 4, 2009

  
EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**  
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