[*1] SCANNED ON 12/17/2009

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

PRESENT: WALTER B. TOLUB PART 1

Index Number : 105140/2009
22 RSD OWNERS LLC
VS
STATE OF NY DIV OF HOUSING &
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 is decided in accordance with the accompanying memorandum opinion.

FILED
DEC 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/16/09

WALTER B. TOLUB J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
22 RSD OWNERS, LLC,

Petitioner,

Index No. 105140/09

Mtn Seq. 001

For a Judgment under Article 78 of the Civil Practice Law and Rules

-against-

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL OFFICE OF RENT ADMINISTRATION,

Respondent.

WALTER B. TOLUB, J.:

This proceeding, commenced pursuant to CPLR Article 78, seeks to reverse, annul and set aside an Administrative Review Order (the Order) of the State of New York Division of Housing and Community Renewal (DHCR), issued on March 20, 2009 under Docket No. WJ430037RO. Petitioner, 22 RSD Owners, LLC (the Owner) claims that the Order was arbitrary, capricious, an abuse of discretion, and contrary to the facts and the applicable laws.

The Order states that on October 29, 2008, petitioner had filed a petition for administrative review (PAR) against an order which had been issued by the Rent Administrator on October 10, 2008, concerning various apartments at the housing accommodation known as 22 Riverside Drive, in New York City. The Rent Administrator had granted the tenants' complaint of a decrease in services.

The tenants' Applications for A Rent Reduction Based Upon Decreased Building-Wide Services were supported by their statements that the building had had 24-hour elevator-operator service since 1970, or earlier, which service was reduced by the Owner to automatic passenger elevator service, and 17 hours of doorman service, in 2007. The tenants claimed that the elevator operator had transported the tenants from the entrance to their individual floors, and that his presence provided a security function in addition to merely lifting them to their apartments.

On October 10, 2008, the Rent Administrator found that, prior to the conversion to a manual passenger elevator, the elevator operator for the manual elevator had provided a level of security by his presence. "Although the owner redeployed the elevator operators as doormen [following the conversion]; there is only 16 hours [sic] of coverage provided. This is not an adequate substitute for manned elevator service 24 hours a day, seven days a week and constitutes a decrease in service. Therefore rent reduction is warranted." The Rent Administrator's order stated that the Owner could file an Application for Restoration of Rent after restoration of 24 hour security service, or upon DHCR's granting of an application to modify the services in question.

In its Order of March 20, 2009, now before this court, the Deputy Commissioner (the Commissioner) affirmed the Order of the

Rent Administrator and denied the Owner's PAR, finding that the Owner had failed to file an application for a decrease in rent or modification of services prior to the elevator conversion, in violation of Sections 2522.4 (d) and (e) of the Rent Stabilization Code (RSC).

In this petition for review of the Commissioner's Order, the Owner alleges that the Commissioner completely overlooked the procedural history of this matter, and the pertinent facts. The history and facts which the Owner claims to be relevant are alleged to be as follows: the subject building is a condominium, with only 9 rent stabilized units currently under DHCR's jurisdiction. There were two manual elevators in the building, a freight elevator and a passenger elevator. Due to the age of the elevators, there were constant problems and great difficulties in obtaining parts for the manual elevators. It was, therefore, necessary to replace the elevator, on the advice of an architect and an engineer. The petition further alleges that the old elevator cab was replaced with a modern, automatic, self-operated elevator, that doormen were hired for seventeen hours per day, and that closed-circuit televisions and a video recording system were installed to monitor the activities in the lobby and the elevators.

The petition further alleges that on April 20, 2007, after the installation of the automatic elevator, the Owner made

application to DHCR for permission to change essential services. The regulated tenants in the premises subsequently submitted a complaint to DHCR, seeking a reduction in rent based upon a claimed decrease in building-wide services. According to the Owner, these tenants complained that they no longer had security due to the change in the elevator systems.

On August 16, 2007 DHCR allegedly advised the Owner of the tenants' complaint.

On January 17, 2008, nine months after the Owner had submitted its Application to Decrease Service, DHCR allegedly notified the Owner that its application had been submitted on the wrong form. The Owner resubmitted its application, and responded to subsequent agency requests for further information or evidence. In its responses, the Owner claimed that, prior to the elevator conversion, there were only two elevator operators, who split the shifts, with the night shift unattended for 7 hours, except upon the request of a tenant. The Owner further alleged that the porter on duty would assist with the controls of the elevator in the infrequent event that the elevator needed lifting during the graveyard shift. This was an added duty, while the porter attended to his basic duties, such as cleaning and garbage collection in the basement. Otherwise, the porter was not in the elevator during this 7-hour shift, according to the petition. There never had been a person guarding the lobby area or manning

the manual elevator 24-hours a day, alleged the Owner, and there had never been a doorman when the manual elevator was in place. Nor had the building had a security system with cameras providing 24-hour DVR recording.

Following the elevator conversion, the elevator operators were redeployed as doormen, claims the Owner. They never acted as security guards, either before or after the conversion, and have never been trained as security personnel.

According to the Owner, the relevant procedural history is that DHCR rendered a decision on the tenants' petition for a reduction in rent prior to entertaining the Owner's application for a change in services, even though the Owner's petition had been earlier filed. The District Rent Administrator allegedly froze the rent on the subject apartments until such time as the Owner provides 24-hour security services.

In subsequent responses to DHCR, in connection with its application to reduce services, the Owner explained that there had never been a person guarding the lobby area or even manning the elevator 24 hours a day. The Owner argues, now, that it is inconceivable that he should now have to provide an additional service to the building, and that he no longer has the authority to provide any additional services, since the building is now a condominium.

In its responses to DHCR, the Owner claims to have cited

Matter of 900 West End Ave. Tenants Assoc. v New York State Div. of Hous. & Community Renewal, 53 AD3d 436 (1st Dept 2008) as authority for the conversion of a manually operated elevator to an automatic elevator. The Rent Administrator arbitrarily refused to consider this case law in rendering its decision on the tenants' application, claims the Owner. In determining whether the modification to the elevators was appropriate, DHCR was required to discern whether the Owner had made an adequate substitute, not whether the manual elevators constituted a decrease in services. The Rent Administrator erred by using the wrong standard to determine the tenants' application, ignoring prior rulings and failing to consider the Owner's application for a decrease in services prior to ruling on the tenants' request for a rent reduction, even though the Owner's application had been submitted earlier. Even now, more than 2 years later, DHCR has still not rendered a decision on the Owner's previously filed application, claims the petitioner here. Clearly, claims the Owner, this failure on the part of DHCR is arbitrary, capricious, and irrational. Further, it was unreasonable for the agency to impose a permanent rent freeze based upon a condition that enhanced services to the building.

It would be economically unfeasible for the Owner to remove the modern automatic elevator and reinstall the manned elevator in order to comply with the Rent Administrator's order. Nor will

Rent Administrator's order was rational and reasonable, in accordance with the applicable law and regulations.

The Owner complains that DHCR acted arbitrarily in deciding the rent reduction application by the tenants prior to the determination of its own post-modification application, arguing that the two applications should have been processed together. The Deputy Commissioner found that it was the Owner's own failure to file a timely application for a modification of services which created the delay now complained of. This finding is supported by the law, and was neither arbitrary nor capricious. Factual questions concerning whether a required service was compromised are properly within the realm of DHCR's expertise, and will not be disturbed by the court in this proceeding. *See Matter of 230 E. 52nd St. Assoc. v State Div. Of Hous. & Comm. Renewal*, 131 AD2d 349 (1st Dept 1987).

ORDERED that the petition to reverse, annul, and set aside an Administrative Review Order of the State of New York Division of Housing and Community Renewal issued on March 20, 2009 under Docket No. WJ430037RO is denied, and the petition is dismissed, with prejudice.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/16/09

HON. WALTER B. TOLUB, J.S.C.