

Short Form Order & Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA PART 18  
Justice

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AIDA BOBADILLA Index  
Number 18077 2003

- against - Motion  
Date February 4, 2004

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL Motion  
Cal. Number 7

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The following papers numbered 1 to 10 read on this application by petitioner Aida Bobadilla which seeks a judgment pursuant to CPLR article 78 reversing, annulling and setting aside the decision and order of respondent New York State Division of Housing and Community Renewal (DHCR) dated May 29, 2003, which revoked the order of November 24, 1999 granting the tenants' petitions for administrative review (PAR), and affirmed the order of the Rent Administrator (RA) determining that owner Fisher Associates (owner) was entitled to a major capital improvement (MCI) rent increase for installation of new apartment windows for the building located at 35-46 74th Street, Jackson Heights, New York, (the subject building) in which petitioner is a tenant residing in Apartment #621.

	<u>Papers Numbered</u>
Notice of Petition - Petition - Exhibits .....	1-3
Answering Affidavits - Exhibits .....	4-8
Reply Affidavits .....	9-10

Upon the foregoing papers it is ordered and adjudged that the petition is determined as follows:

The owner filed an application on October 26, 1990 for an MCI increase for various work, including installation of new windows. At the time of the MCI application, two rent reduction orders for decreased building-wide services in the subject building were in effect. Rent reduction order Docket No. AJ130002B, issued on

October 8, 1987, decreased the rent based on rodent infestation, peeling paint and plaster, and cracked windows. Rent reduction order Docket No. CJ130063B, issued on June 19, 1989, decreased the rent due to peeling paint and plaster in the windows in the public hallways, the failure of the roof doors to close securely, cracked and missing window panes in the laundry room and basement, and inoperative elevator fans. The owner filed PARs against these rent reduction orders prior to filing the MCI application. By decision and order dated March 28, 1991, the Deputy Commissioner denied the owner's PARs and affirmed the rent reduction orders.

On April 15, 1991, the owner submitted its rent restoration application regarding rent reduction order CJ130063B. By order dated July 22, 1992, the rent was restored in part for the rent controlled tenants effective August 1, 1992, but the elevator fans were found not to be maintained. The RA stated, in relevant part:

"Regarding the issue of inoperative elevator fans, the owner has submitted documentation indicating that the elevators have never been equipped with fans. However, Order Number CJ130063B determined elevator fans to be a required service and the owner failed to raise this issue in its Petition for Administrative Review, which was denied by Commissioner's Order dated March 28, 1991..."

The owner filed a PAR against the July 22, 1992 rent restoration order, which was denied by the Deputy Commissioner's order dated February 22, 1994. The owner filed a rent restoration application in October 1994. Pursuant to rent restoration orders dated April 3, 1995 and April 23, 1996, the conditions upon which the rent reduction orders were based were found to be corrected and the rent was restored effective February 1, 1995 for rent controlled tenants and December 1, 1995 for rent stabilized tenants. Thereafter, the owner's MCI application was granted on June 11, 1996, effective December 1, 1995 for rent stabilized tenants and July 1, 1996 for rent controlled tenants.

Several tenants filed PARs of the order granting the MCI rent increase, arguing that the owner was not eligible to apply for an MCI increase because two rent reduction orders were in effect for failure to provide or maintain building-wide services. By order dated November 24, 1999, the Deputy Commissioner granted the tenants' PARs and revoked the order granting the MCI rental increase, stating in relevant part, as follows:

"A review of the Division's records indicates that at the time the MCI application was filed on October 26, 1990, there was still in effect two building-wide rent

reduction orders against the subject premises. The Commissioner finds that the sanction against rent increases imposed by said rent reduction orders was not finally eliminated until a rent restoration application under Docket Number JJ130273OR was granted on April 23, 1996. A prior rent restoration application (under Docket Number FD130047OR) was denied as to rent stabilized tenants on July 22, 1992 and said denial was upheld by Commissioner's order (under Docket Number GH130262RO) issued on February 22, 1994. The MCI application at that point should have been denied pursuant to Policy Statement 90-8. The Commissioner notes that a new restoration application was not filed by the owner until October 1994."

The owner commenced an Article 78 proceeding challenging the November 24, 1999 order. The parties agreed to remit the matter to the DHCR and on May 29, 2003 the Deputy Commissioner issued the order challenged in the instant Article 78 proceeding, revoking the November 24, 1999 order and affirming the RA's order granting the MCI rent increase. In the order challenged herein, the Deputy Commissioner stated in pertinent part as follows:

"A review of the Division's records indicates that while there were two building wide rent reduction orders in effect at the time the MCI application was filed, the owner had filed applications to restore the rents based on the restoration of the services that were the subject of those orders. It is also clear that a period of a few months existed during the pendency of the MCI application, where there was no rent restoration application or Administrative Appeal (PAR) pending relative to the outstanding rent reduction order (the owner did re-file rent restoration applications claiming the services were restored). However, it cannot be said that the failure to deny the MCI during this short time was an abuse of discretion, especially in view of the apparent remediation of the services for which the rent reductions had been granted and the fact that the owner was continually challenging the requirement to repair the elevator fan, as it continually claimed that there was never an elevator fan. Given that the MCI application remained pending and as the rent restoration applications were granted (Docket No. IK130006OR, issued on April 3, 1995 and Docket No. JJ130273OR, issued on April 23, 1996 [related to Docket No. CJ130063B], and Docket No. FC130082OR, issued on July 10, 1991 [related to Docket No. AJ130002B]), the Commissioner's prior order

was issued in error and should be revoked since the services had been restored prior to the issuance of the pending Rent Administrator's order."

Herein, petitioner argues that the challenged order should be annulled, reversed and set aside for the reason that the respondent DHCR did not apply the processing provisions of its own Policy Statement 90-8 to the MCI application which is the subject of the challenged order.

Policy Statement 90-8 (Failure to Maintain Services/Processing MCI Applications) describes the procedures for processing MCI applications in accordance with New York City Rent Stabilization Code § 2522.4(a)(13), which states in relevant part as follows:

"The DHCR shall not grant an owner's application for a rental adjustment...in whole or in part, if it is determined by the DHCR prior to the granting of approval to collect such adjustment that the owner is not maintaining all required services, or that there are current immediately hazardous violations of any municipal, county, state or federal law which relate to the maintenance of such services. However, as determined by the DHCR, such application may be granted upon condition that such services will be restored within a reasonable time, and certain tenant-caused violations may be excepted."

The procedure for processing an MCI application when rent reduction orders are outstanding is described in Policy Statement 90-8 in pertinent part as follows:

"Where there is a DHCR order in effect determining a failure to maintain a building-wide service which resulted in a rent reduction, when an MCI increase is applied for, an order of denial of the MCI application will be issued. However, if the owner has filed for a rent restoration with DHCR, the pending restoration application will be expedited. The MCI application will be held until the restoration application has been determined. If it is granted, the prospective MCI increase will be collectible for those periods in which there was no rent reduction order in effect..."

"Where a Petition for Administrative Review (PAR) has been filed by the owner against a building-wide service reduction, the PAR proceeding will be expedited. If the service reduction is overturned by the PAR Unit, then the

MCI application will be processed disregarding the service reduction. Where the PAR is decided against the owner, and the service reduction is still in effect, an order of denial of the MCI application will be issued..."

It is well settled that the court's power to review an administrative action is limited to a review of the record which was before the DHCR and to the question of whether its determination was arbitrary and capricious and without a rational basis (see Matter of Colton v Berman, 21 NY2d 322 [1967]; Matter of 36-08 Queens Realty v New York State Div. Of Hous. & Community Renewal, 222 AD2d 440 [1995]). In the case at bar, the court finds that the DHCR's decision and order of May 29, 2003 has a reasonable basis in the law and record and is neither arbitrary nor capricious.

Rent Stabilization Code § 2522.4(a)(13) makes it discretionary with respondent DHCR either to deny an MCI application when the applicant is not maintaining all required services or to grant the application on condition that such services will be restored within a reasonable period of time (see Residential Mgmt. v Division of Hous. & Community Renewal, 234 AD2d 154 [1996]). The statute specifically gives DHCR the discretionary power to grant an MCI application despite the existence of outstanding rent reduction orders. Herein, at the time the DHCR granted the owner's MCI application on June 11, 1996, there were no rent reduction orders in effect for the subject building. Thus, although no rent restoration applications or PARs were pending during the period from February 1994 to October 1994, the DHCR was within its broad discretionary powers in holding the MCI application and granting said application after the conditions upon which the rent reduction orders were based were corrected and the rent was restored. Therefore, the court finds that the DHCR acted within its statutory powers and therefore its determination had a reasonable basis in the law and record and was neither arbitrary nor capricious.

Accordingly, petitioner's application is denied and the petition is dismissed.

The foregoing constitutes the order and judgment of the court.

Dated: June 24, 2004

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J.S.C.