Matter of Schoberle v Division of Housing and Community Renewal
2003 NY Slip Op 30146(U)
November 20, 2003
Supreme Court, New York County
Docket Number:
Judge: Nicholas Figueroa

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

PRESENT: HON. NICHOLAS FIGUEROA PART 46

0104940/2003

SCHOBERLE, CECILE
VS
N.Y.S.D.H.C.R.

INDEX NO. 104940/03

MOTION DATE 6/25/03

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

SEQ 1

ARTICLE 78

Article 78

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision, order and judgment

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: NOVEMBER 20, 2003

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
CECILE SCHOBERLE,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

- against -

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

- and -

235 WEST 71st STREET, LLC,

Intervenor-Respondent.

Index No. 104940/03

DECISION, ORDER AND JUDGMENT

Figueroa, Nicholas, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondent Division of Housing and Community Renewal's (DHCR) January 17,2003 order denying petitioner's Petitioner for Administrative Review (PAR) and affirming the Rent Administrator's June 26,2002 order, which on remand, denied petitioner's request for a rent reduction because of the intervenor-respondent's termination of a previously furnished service: storage space.

In an undated stipulation, all parties agreed that the owner of the apartment building, 235 West 71st Street, LLC, would be permitted to intervene in this proceeding and that the caption would be amended accordingly. That stipulation has not been "so ordered" and

apparently has not been filed with the Clerk of the Court or the Clerk of the Trial Support Office. Howevsr, the court, on its own motion, designates the owner as an intervenor-respondent and directs that the caption be amended accordingly. The owner will be referred to as the intervenor.

The facts and circumstances giving rise to this proceeding began in 1990 when petitioner, and other tenants of 235 West 71st Street, filed a complaint with DHCR alleging that the elimination of their storage facilities constituted a diminution of services entitling them to a rent decrease.

The intervenor opposed the complaint, stating that access to a storage area was never included in its leases, or the building services registration, and that in any event, the basement space was too small to accommodate the storage requirements of the building's thirty six dwellings.

The tenants countered that the intervenor had previously supplied storage space when they had first moved into the building, before its conversion into a laundry room. Responding, the intervenor asserted that the tenants were never authorized to use the basement area for storage, although some did so without authorization.

On April 29, 1993 DHCR issued an order reducing the tenants' rent based on their loss of the storage facilities. On September 22, 1995, the intervenor filed a PAR challenging the reduction. It alleged that the area was never intended for storage purposes, and that moreover, the tenants' use was unauthorized. During the PAR's pendency, DHCR promulgated a November 10, 1995 memorandum establishing guidelines for the types of service reductions which would qualify for rent reductions and, conversely, the types of service reductions that would be considered *de minimis*. The intervenor supplemented its PAR with a copy of the

memorandum's guidelines, alleging that the loss of storage space was *de minimis*. The memorandum's thrust is that removal or reduction of storage space is deemed *de minimis*, unless there is a lease provision entitling use of the storage space, or unless the tenant complains about the loss within four years.

DHCR denied the PAR on July 15, 1996, stating that the intervenor had failed to meet its burden of proving that the tenants lacked authority to utilize the storage area, or that it had not previously provided the service.

The intervenor challenged the denial of its PAR in an Article 78 proceeding. Trial Term denied both the petition and DHCR's motion to remit, and affirmed the rent reduction. *(Matter of Hakim, West 71st Street v. New York State Division of Housing and Community Renewal,* 176 Misc.2d 358.)

The Appellate Division reversed the court's order *(Matter of Hakim, West 71st Street v. New York State Division of Housing and Community Renewal,* 273 A.D.2d *3),* and remanded the matter "so that DHCR may consider the impact of [the] 1995 DHCR Memorandum on its determination whether the alleged removal of storage space warranted a rent reduction for tenants in this proceeding" *(id.)*. The appellate court noted that the memorandum was meant to serve as a guideline for the uniform processing of service reduction complaints and, that by failing to consider it, DHCR had "failed to adhere to existing standards and precedents in rendering its decision" *(id.)*.

Subsequent to the Appellate Division order, DHCR sent notices to the tenants asking whether they could produce a specific lease rider providing for storage space or whether they had evidence of storage boxes or bins being provided within four years of the service reduction

complaint.

None of the tenants submitted such evidence or a lease provision addressing the topic of storage facilities. Some tenants responded that as rent controlled tenants, they had entered into leases in the 1960's and had storage service from then until the service was discontinued. One rent stabilized tenant claimed that the intervenor had provided storage space until 1983.

The intervenor contended that the availability of storage space was a *de minimis* item, as shown by the tenants failing to file a complaint within four years of its alleged discontinuance. The intervenor added that the *de minimis* standard had recently been codified; therefore, it argued that, "as a matter of law, a rent reduction cannot be issued."

Applying the *de minimis* criteria, DHCR's Rent Administrator reversed itself in an Order Pursuant to Remand issued on June 26, 2002. The order stressed that none of the complaining tenants had submitted a lease agreement providing for storage, and that the tenants had acquiesced in the withdrawal of the storage space for some seven years. Based on these findings, and using the November 1995 memorandum's guidelines, the Rent Administrator revoked the prior order granting the rent reduction because there was no lease provision for storage space and the tenants had failed to file complaints within four years of the loss. Therefore, the loss of the space was considered *de minimis*.

Petitioner filed her PAR challenging the agency's order on July 29, 2002. She alleged that DHCR had issued the rent reduction order after its 1995 *de minimis* services memorandum and had reached erroneous conclusions based on that memorandum. Moreover, she asserted that because the memorandum was being applied retroactively it constituted an unconstitutional *ex post facto* ruling.

In opposing the PAR, the intervenor noted that DCHR had been upheld when issuing amended code provisions, revised Operational Bulletins and policy memorandums in making its determinations.

In its January 17,2003 Order and Opinion Denying the PAR, the Deputy Commissioner considered petitioner's contentions that the Rent Administrator had made new factual findings contradicting the earlier order's findings; that it improperly applied the 1995 memorandum retroactively; and, that the order ignored the tenants' forty years of storage room usage.

The Deputy Commissioner emphasized that the appellate court had remanded the matter to enable DHCR to consider the 1995 memorandum's impact. Continuing, the Deputy Commissioner stated that under the memorandum, the elimination or reduction of storage space is considered *de minimis,* unless a lease provision provides for it or the landlord had supplied the storage space within four years of a tenant filing a complaint. He added that the memorandum was later codified in Rent Stabilization Code [9 NYCRR] §2523.4(e); and that under §2534.4(f) DHCR may consider the passage of time during which the owner ceased to supply the service and the filing of the tenant's complaint. Section 2534.4(f) (1) adds that filing a complaint after four or more years of the discontinuance of a service is presumptive evidence that the service is *de minimis* under these Rent Stabilization Code provisions, which became effective December 20,2000.

In deciding the issue of whether the removal of the storage space was a service reduction, the Deputy Commissioner took cognizance of petitioner's contention that the 1995 memorandum could not be applied retroactively, because it was not in existence when the Rent Administrator issued its first 1993 order. However, the Deputy Commissioner noted that DHCR's policy, prior

to the memorandum, had always been to deny rent decreases for loss of minor services that had a minimal impact on the enjoyment and habitability of premises, and that the 1995 memorandum merely put this policy into writing, and "provide[s] some guidelines and structure to this practice."

Continuing, the Deputy Commissioner wrote that the Appellate Division required that DHCR consider the effect of the 1995 memorandum. In complying with that order, DHCR investigated the factors bearing on the impact of removal of the storage space. In doing so, DHCR properly considered the absence of a lease provision relating to storage space, and the length of time between its termination and their complaint. Using these factors, the Deputy Commissioner found that the Rent Administrator had properly concluded that removal of the storage space had a minimal impact on the enjoyment of the premises, and determined that this represented a *de minimis* change, rather than a decrease in services.

The Deputy Commissioner further held that the memorandum's codification [9 NYCRR] Rent Stabilization Code §§2523.4(e) and 2523.4(f) became effective in December 2000, a date during the instant proceeding's pendency, due to the Appellate Division's remand. As [9 NYCRR] Rent Stabilization Code §2527.7 provides that when a Code enactment or statute is passed during the pendency of a proceeding, it becomes applicable to that proceeding.

The Deputy Commissioner therefore affirmed the Rent Administrator's denial of a rent decrease.

Conclusions

DHCR's determination was not arbitrary or capricious or contrary to law. Rather, it was a rational determination consistent with its lawful powers (see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222; *Matter of Colton v. Berman*, 21 N.Y.2d 322).

Contrary to petitioner's argument, DHCR did not apply an unconstitutional standard in making its determination. As an intervenor, petitioner raised this argument in *Matter of Hakim v. Division of Housing and Community Renewal*, 176 Misc.2d 358, *id*. However, the First Department, in reversing, directed DHCR to determine the issue on the basis of the 1995 memorandum. By applying the memorandum's standards, DHCR complied with the Appellate Division order, as it was lawfully bound to do. In any event, petitioner's argument is misplaced, since this is not a criminal proceeding (see *Matter of L'Hommedieu v. Board of Regents of the University of the State of New York*, 276 App. Div. 494, *affd*, on other grounds *sub. nom.*, *Thompson v. Wallin*, 301 N.Y. 476).

Similarly, there is no merit to petitioner's argument that DHCR could not legally render its determination because the First Department's reversal was on the law, and not the facts. Since this argument was not raised on the PAR, petitioner may not belatedly raise it now (see *Matter of Muller v. New York State Division of Housing and Community Renewal*, 263 A.D.2d 296). Moreover, CPLR §5712(c)(1), which requires the Appellate Division to state whether a determination is on the law, and §5712(c)(2), which requires a statement as to whether a determination is on the facts or both the law and the facts, simply comprise an instruction directed to the Court of Appeals for purposes of appellate review (Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C5712:1). The Appellate

Division instruction is not one directed at a trial court or administrative agency, and may not be treated as a restriction for the agency on a remand.

Similarly, the PAR did not contain the argument, raised now, that the decision unconstitutionally impaired the obligation of a contract. Notably, petitioner has failed to produce a contract establishing the contract right which she claims is impaired.

DHCR determines whether a particular service is to be designated a required service (see *Matter of Fresh Meadows Associates v. Conciliation and Appeals Board*, 88 Misc.2d 1003, *affd*, 55 A.D.2d 559, *affd* for the reasons stated by Mr. Justice Nadel at Special Term, 42 N.Y.2d 925). Petitioner has not shown that DHCR's determination in this case is arbitrary, capricious or irrational *(id.)*. Notably, the PAR fails to demonstrate facts showing that removal of the storage space had an adverse impact on petitioner's ability to enjoy the use of the premises (cf. *Matter of Missionary Sisters of Sacred Heart v. Division of Housing and Community Renewal*, 288 A.D.2d 16).

The time interval between the loss of service and the complaint was a proper basis for DHCR's determination. DHCR may establish time limits for filing complaints (see *Matter of Hampton Management v. Division of Housing and Community Renewal*, 255 A.D.2d 260). The 1995 memorandum establishes a four year period within which a tenant must complain about a service loss. After that time, the service is presumed *de minimis*. Petitioner's seven year delay in complaining about the service loss permitted DHCR to rationally determine that the loss had a minimal effect on petitioner's use of the premises. Had the impact been significant, it is rational to presume that a tenant would complain reasonably soon after the loss, so that the service could be restored, or compensation rendered. Here there was no timely complaint.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed, and it is

ORDERED that 225 West 71st Street, LLC, is permitted to intervene as a party respondent and the caption is amended to reflect inclusion of that additional party respondent and the Clerk of the Court and the Clerk of the Trial Support Office, upon service on each of them of a copy of this judgment and order with notice of entry, shall mark their records accordingly.

This constitutes the decision, order, and judgment of the court.

Dated: November 20, 2003

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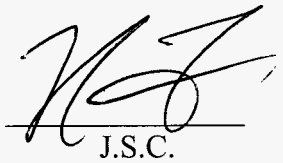

J.S.C.