

Matter of 333 East 49th Associates, LP v New York State Division of Housing and Community Renewal

2005 NY Slip Op 30344(U)

September 20, 2005

Supreme Court, New York County

Docket Number: 117813/04

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich

PART 54

0117813/2004

333 EAST 49TH ASSOCIATES
vs
NYS DIV. OF HOUSING

INDEX NO. 117813/04
MOTION DATE 6/2/05
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

SEQ 1
ARTICLE 78

The following papers, numbered 1 to 6 were read on this motion to/for Art. 78

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order

FILED
SEP 23 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/20/05

SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 54

-----X

In the matter of the application of
333 EAST 49TH ASSOCIATES, LP and
BLDG MANAGEMENT CO., INC.
D/B/A DEVON MANAGEMENT CO.,

Petitioners,

Index No.: 117813/04

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

**DECISION
and ORDER**

-against-

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

Respondents.

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is a special proceeding pursuant to Article 78. Petitioners 333 East 49th Associates, LP (“333 East 49th” or “Owner”) and BLDG Management Co., Inc. d/b/a Devon Management Co. (“Devon”) are the owner and management company of an apartment building at 333 East 49th Street in New York City.

I. Background

On March 19, 2003, tenants of the building commenced a rent reduction proceeding with respondent New York State Division of Housing and Community Renewal, Office of Rent Administration (“DHCR”), based on “decreases in services.” Pet., Exhibit B. As pertinent here, the DHCR Administrator determined that janitor service was “inadequate in compactor rooms on 11th, 9th and 7th floors at the north [sic] side and 10th and 4th floor of south [sic] side of the

building.” *Id.* The Administrator ordered that the legal regulated rent be reduced pursuant to Rent Stabilization Code Sections 2520.6(r) and 2523.4, and Operational Bulletin 95-1. *Id.*

On April 9, 2004, petitioners filed a Petition for Administrative Review (“PAR”) with the DHCR Commissioner, seeking to overturn the Administrator’s rent reduction order. Pet., Ex. A. By Order and Opinion dated October 21, 2004, the Commissioner denied the PAR. “After careful consideration of the entire evidence of record,” the Commissioner found that “[t]he owner’s PAR does not establish any basis to modify or revoke the Administrator’s determination, which was based on two inspections, conducted on September 23, 2003, and February 13, 2004... .” *Id.* The Commissioner considered, and rejected, the three arguments presented by the Owner, as follows:

First, Owner argued that “there was no complaint about the compactor room by the tenants except for mice...” *Id.* The Commissioner disagreed, finding that the tenants’ application “cited the compactor rooms in the building as ‘not being maintained and filthy and that there were mice in the compactor rooms’”. *Id.* The Commissioner noted that the inspection report “confirmed the tenants allegation that several of the compactor rooms were filthy as alleged and not being maintained.” *Id.*

Second, Owner argued that the Administrator’s order was “vague and not specific enough with regards to the exact location of the deficiencies.” *Id.* The Commissioner found this argument “wholly without merit” because the Administrator’s order “stated that the compactor rooms on the 7th, 9th and 11th floors on the north [sic] side of the building and on the 4th, 7th and 10th floor[s] on the south [sic] side of the building were found to be filthy and not maintained and this finding by itself is sufficient notice to the owner of a serious deficiency

warranting a thorough inspection of the affected area.” *Id.*

Third, the Owner argued that the Administrator’s order was overbroad because it directed a rent reduction for all the complaining tenants, whereas it should only have reduced the rent for tenants on the floors of the affected compactor rooms. The Commissioner rejected this argument on the ground that the compactor rooms were “buildingwide services.” The Commissioner held that it was “irrelevant that the compactor rooms were on certain floors, they are public areas in the building and as such the non-maintenance of some of the compactor rooms in the building poses a health hazard to the entire building.” *Id.*

II. *The Instant Petition*

Here, petitioners seek to overturn the Commissioner’s order of October 21, 2004, and to either dismiss the tenants’ complaint or remand the proceeding to the Administrator for a new determination. Petitioners submit the Petition, together with exhibits (the DHCR orders; copies of decisions in other proceedings). Respondents submit their Verified Answer, and their attorney’s affirmation in opposition. Petitioners have replied.

III. *Conclusions of Law*

In reviewing DHCR orders, the Court “must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious.” *See Gilman*, 99 N.Y.2d at 149 citing *Matter of Nehorayoff v. Mills*, 95 N.Y.2d 671, 675 (2001). “Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld.” *Ansonia*

Residents Asso. v. New York State Div. of Housing & Community Renewal, 75 N.Y.2d 206, 213 (1989) (citations omitted). *Accord Hawthorne Gardens, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 4 A.D.3d 135, 136 (1st Dept. 2004) citing *Wembly Management Co. v. New York State Div. of Hous. & Community Renewal, Office of Rent Admin.*, 205 A.D.2d 319 (1st Dept. 1994).

Here, it is undisputed that DHCR is authorized, under NYCRR § 2520.6(r) and § 2523.4(e), to reduce rents upon a finding that the owner has failed to maintain required services. Nor is it disputed that DHCR has discretion in determining what constitutes a required service and its proper maintenance. *See Missionary Sisters of the Sacred Heart v. Div. of Hous. & Cmty. Renewal*, 288 A.D.2d 16, 17 (1st Dept. 2001) (“Respondent’s determination that the reduction in the availability of the building laundry room from 24 to 15 hours per day constituted a reduction in service had a rational basis in the record. The credited testimony of the tenants established that the reduction in hours had a significant adverse impact on the tenants’ ability to enjoy the laundry service. The question of what constitutes a required service and whether such service was being maintained was a factual issue to be determined by respondent”) citing *Fresh Meadows Assocs. v Conciliation & Appeals Bd.*, 88 Misc.2d 1003, 1004 (Sup.Ct. NY Co. 1976) *affd* 55 A.D.2d 559 (1st Dept. 1976), *affd* 42 N.Y.2d 925 (1977).

Petitioners now contend that: (1) the inspection report, on which the Administrator’s decision was based, was improperly “vague and non-specific” as to the claimed inadequate janitorial condition; (2) the inadequate conditions were *de minimus*, because most of the building was found to have adequate janitorial service; (3) the inadequate conditions were caused by the tenants; (4) the rent should not have been reduced for tenants who did not reside on the floors of the subject compactor rooms; and (5) the inadequacy found in the compactor rooms would have

been remedied the next day by regular maintenance.

The Court notes, at the outset, that “the function of the court upon an application for relief under CPLR article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered.” *Fanelli v. New York City Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1st Dept. 1982) *affd* 58 N.Y.2d 952 (1983) citing *Matter of Levine v. New York State Liq. Auth.*, 23 N.Y.2d 863 (1968). It appears that some of the arguments here raised by petitioners were not raised in the proceedings below, and thus, should be precluded. Nevertheless, even considering the arguments, the Court finds them without merit, as follows.

The first argument (vagueness of report) was considered and disposed by the Commissioner, because the inspection reports stated with specificity that the compactor rooms on the 7th, 9th and 11th floors on the north [sic] side of the building and on the 4th, 7th and 10th floor[s] on the south [sic] side of the building were found to be filthy and not maintained and this finding by itself is sufficient notice to the owner of a serious deficiency warranting a thorough inspection of the affected area.”

The second argument (*de minimus* conditions) is not supported by the record. RSC Section 2523.4(e), which petitioners cite, states that a *de minimis* condition is one that has only a “minimal impact on tenants...” Incorporated into 2523.4(e) is a “Schedule of De Minimis Conditions,” which sets forth a non-exclusive list of conditions that “will generally not constitute a failure to maintain a required service.” *Id.* Paragraph 12 thereof, which petitioners also cite, provides that with respect to “janitorial services,” a *de minimus* condition is a “failure to clean or

dust discrete areas, where there is evidence that janitorial services are being regularly provided because most areas are, in fact, clean.” *Id.* 9 NYCRR § 2523.4 The Commissioner found, based on the inspection reports, that the filthy conditions in several compactor rooms constituted a health hazard to all of the tenants in the building. There is no evidence that the subject rooms were otherwise clean, except for a few unclean or dusty areas. Thus, the Commissioner’s finding was supported by the record, and not irrational.

The third argument (conditions caused by tenants) is a factual issue, the resolution of which is consigned to the discretion of DHCR, so long as the decision has a rational basis in the record. As noted, the inspector’s reports provided such a basis. Respondent points to no evidence that the tenants caused the condition, except that they allegedly did not deny petitioner’s allegation that they did. Even had there been some evidence that the tenants were responsible, the respondents’ evaluation of competing evidence is not for the Court to disturb. *See Hawthorne Gardens*, 4 A.D.3d at 136.

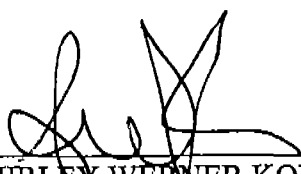
The fourth argument was directly addressed and rejected by the Commissioner. The Court does not find unreasonable the Commissioner’s conclusion that filthy conditions in compactor rooms on several floors of the building constituted a health hazard to all of the tenants in the building, who use these common spaces, and the waste disposal system. The Commissioner’s decision involved “knowledge and understanding of underlying operational practices” and, thus, should be upheld unless irrational. *See Ansonia Residents Assoc.*, 75 N.Y.2d at 213.

Finally, the fifth argument (condition remedied by regular maintenance) is not supported by any evidence. Petitioners state that “any condition observed by the inspector would have been

resolved later that day or the following day (if the porter had already been to that room that day).”
Pet. at 54. However, the record contains no evidence of this. Nor is there any indication that
petitioners presented any such evidence in the proceedings before DHCR. Thus, the Court finds
that the Commissioner’s decision was rationally supported by the record, and was not arbitrary or
capricious. Accordingly, it is

ORDERED that the petition is denied, and the Clerk is directed to enter judgment
accordingly.

Date: September ^{20,} 16, 2005
New York, New York



SHIRLEY WERNER KORNREICH

FILED
SEP 23 2005
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