Matter of Diagonal Realty, LLC v New York State Div. of Hous. and Community Renewal
2005 NY Slip Op 30622(U)
January 20, 2005
Supreme Court, New York County
Docket Number: 113301/04
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of
DIAGONAL REALTY, LLC,

Index No. 113301/04

Petitioner,

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

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

Dkt. No. RK-410015-RO (RC-410113-S)

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EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Diagonal Realty, LLC ("petitioner") moves for a judgment, pursuant to CPLR 7808(3), reversing, annulling and setting aside the Order, issued by Deputy Commissioner Paul Roldan, of respondent New York State Division of Housing and Community Renewal (the "DHCR"), on July 28, 2004, Docket No. No. RK-410015-RO (the "Challenged Order"), as arbitrary, capricious and in violation of the law. Petitioner argues that the DHCR's Deputy Commissioner erred in affirming the Rent Administrator's Order (Docket No. RC-410013-S) (the "Rent Administrator's Order"), and taking actions contrary to the directives of the Rent Stabilization Law ("RSL"). Further, the DHCR erred in affirming the Rent Administrator's Order which reduced the rent at Apartment 44 (the "subject apartment"), at premises known as and located at 530 West 174th Street, New York, New York (the "subject premises"). Finally, petitioner argues that it was denied due process.

Respondent opposes this application and requests that the Petition be denied and dismissed and that costs be awarded to respondent.

The facts, as articulated in the Verified Petition are that petitioner is the owner of the subject premises, and has been the owner of the subject premises as the term is defined in the RSL, as amended, and the implementing Rent Stabilization Code ("RSC") of the subject premises.

Respondent DHCR is charged with the duty and obligation of administering the RSL and implementing regulations.

The subject apartment at the subject premises is subject to the Emergency Tenant Protection Act ("ETPA"), RSL and RSC.

Petitioner contends that on or about April 9, 2003, it received a Notice of the Tenant's Application for Rent Reduction in which various complaints concerning the kitchen, bathroom, livingroom and hall inside the subject apartment were alleged. The petitioner disputed the Tenant's claims, but the Rent Administrator issued an Order Reducing Rent based upon decreases in services. The Order was based on and limited to four items and contained limited comments, concerning the Bathroom Sink, Bathroom Door, Enamel Bathtub, and Hallway Floor. Based on the limited findings, the DHCR reduced the rent for the subject apartment at the subject premises.

On or about October 29, 2003, the petitioner filed a Petition for Administrative Review ("PAR") of the Rent Administrator's Order, which proceeding was issued Docket Number RK-410015-RO, and which resulted in the Challenged Order.

In its Verified Petition, petitioner first argues that the DHCR erred in not finding that the

complaints concerning the sink were created by the tenant. Petitioner argues that the tenant's complaint was that there was a leaky pipe in the bathroom. Petitioner responded that the leak resulted from illegal plumbing undertaken by the tenant to install an illegal washing machine. Further, the tenant tampered with the plumbing where the leak had occurred. The petitioner ordered the tenant to remove the illegal plumbing hook-up and the tenant has complied. The leaking showerbody was repaired/replaced. All sink leaks were repaired. Thereafter, by inspection conducted September 23, 2003, as noted in the Order reducing rent, the DHCR found that the "[b]athroom sink water is leaking due to no device being provided to turn water off." The petitioner argues that the bathroom sink originally had shutoff valves which the tenant removed in his illegal installation of the hot and cold water supply to his washing machine. In short, as the Tenant himself has twice jury rigged the plumbing in his apartment, any leaks or missing devices to the tenant's sink were caused by the tenant. The tenant has not refuted that he, in fact, first installed and then removed the illegal supply lines at the sink where there allegedly is a leak, that the tenant removed the shut-off valves and never replaced them. At the very least, the DHCR has an obligation to investigate further the cause of any problems relating to the bathroom sink on the facts presented, and it cannot be said that the Agency's determination, absent such investigation or inquiry, had a rational basis and was not arbitrary and capricious.

Petitioner next argues that the DHCR erred in holding petitioner responsible for the bathroom door as the tenant refused to allow petitioner to replace the door and the lock. Further, the reduction should not have been based on complaints not asserted by the tenant. In the tenant's original complaint, the tenant alleged that the bathroom had a "broken door lock" and

that the "toilet does not allow door to close." As an initial matter, the Order Reducing Rent improperly found, in addition to the above complaints, that the door is misaligned and has gaps. These latter allegations were not asserted by the tenant and it was improper for the Order Reducing Rent to reduce the rent based on such items. As these are items not complained of by the tenant, and for which petitioner had no notice, the rent reduction should not have been based on these non-alleged issues. And, the DHCR should in this instance, as it routinely does, revoke the rent reduction which is based on conditions found after an inspection about which the tenant did not complain.

Further, as the tenant refused petitioner's offers to replace the bathroom door and lock, the rent reduction was improper. The tenant refused to accept petitioner's offer of replacing the door and lock, but instead insisted on petitioner replacing the toilet. As the toilet was relatively new, petitioner was disinclined to replace the toilet. Finally, at the time of the inspection, the lower part of the bathroom door was trimmed so the door would pass the new toilet and close properly. At the time of the inspection, the door properly closed, and the tenant's continued complaint that the door did not properly close was unfounded. The DHCR should comply with its longstanding policy that if an owner offers to replace a defective item complained about, and the tenant refuses to accept the repair or replacement, the tenant is not entitled to a rent reduction on the basis of that aspect of the complaint.

Petitioner next argues that the DHCR erred in granting a rent reduction for the bathroom door and lock as tenant had not complained of this condition for four years. Such a delay in complaint for a four year period is presumptive evidence that the condition complained of is *de minimus*. In this case, the tenant first complained of the bathroom door and lock in March of

2003. The old toilet was replaced, by estimates of the superintendent, over five years prior to August of 2003. This fact was pointed out to the DHCR in petitioner's correspondence dated August 7, 2003, yet it was ignored by the DHCR in its determination granting and affirming a rent reduction. Further, the tenant did not dispute the fact concerning the date of the replacement of the toilet. Petitioner is entitled to the benefit of the codified presumption that the condition was *de minimus.*

Next, petitioner argues that the DHCR erred in reducing the tenant's rent based on "enamel bathtub" as the inspection did not substantiate this complaint. An inspection of the subject premises was conducted on September 23, 2003, and the Order Reducing Rent specifically lists the defects found at the subject apartment, and notable by its absence, is any mention of the bathtub. Simply put, the improperly included the tenant's allegation, "rusty tub," as part of the basis of the Order Reducing Rent. There simply was no support for this finding and determination. While the DHCR is usually entitled to rely on its own inspector's reports in determining the physical aspects of complaints, in this case, no such findings or determinations regarding the tenant's bathtub were made or even mentioned in the inspection. Without any support whatsoever, the DHCR simply credited the tenant's allegations.

Further, petitioner argues that the DHCR erred in reducing the tenant's rent based on "enamel tub" as any excess wear condition was a result of the tenant's own illegal in in the tub. As noted above, petitioner witnessed and asserted that the tenant had illegally installed, and drained a washing machine into the tub complained of. This fact was undisputed by the tenant, and based on the DHCR's own policy statements, should have been credited and accepted by the DHCR. Further, as noted above, this was a tenant-created problem. The long-standing DHCR

policy regarding tenant-caused problems was ignored in this case.

Finally, the DHCR erred in reducing the tenant's rent based on a sagging floor and based on un-complained of squeak. As an initial matter, the tenant did not complain of squeaks in the floor, and as such, it was improper for the District Rent Administrative ("DRA") and the DHCR, on appeal, to include "squeaks" in hallway floor as a basis for the Order Reducing Rent. The petitioner reiterates that the DHCR routinely revokes rent reductions which are based on conditions found after an inspection about which the tenant had not complained. As to the sagging in the floor, it is presumptively *de minimus* as it is a condition which has existed since before the tenant assumed occupancy many years prior to the instant complaint. No previous complaints have been made about this condition, which is not dangerous (nor was it found to be so), for a period far in excess of five years. Petitioner advised DHCR that this condition was a result of the building's age and the fact that wooden structures settle as they age. Petitioner also asserted that the complained of condition has not changed for a very long time.

For and in its Verified Answer, respondent denies each and every allegation in the Verified Petition and the accompanying affidavits which (1) purport to characterize or summarize the administrative proceedings, facts, evidence, agency orders, determinations, policy statements or actions, the laws and regulations which the agency administers, or court proceedings or decisions, or (2) which state or imply that orders, determinations, policy statements, or actions of the Commissioner were in any way arbitrary, capricious, an abuse of discretion, in error, in violation of controlling law, or deny due process or in any way contradict the factual record.

Further, respondent denies each and every allegation in the Verified Petition and the accompanying papers insofar as such allegations characterize or attempt to characterize the

administrative record in this proceeding, and the various statutes, codes and regulations cited therein, and respectfully refers the court to the administrative record for the true and accurate content thereof. Respondent further refers the court to the DHCR's Brief submitted simultaneously with the DHCR Verified Answer.

Respondent argues that the order of the Commissioner of DHCR was in all respects within the Commissioner's power, rational, neither arbitrary nor capricious and in full accord with all applicable laws, including the Rent Stabilization Law and Code.

Respondent contends that Section 2523.4 of the RSC authorizes the Rent Administrator, upon complaint of a tenant, to order the restoration of services and grant a reduction where it is determined that the required services are not maintained. In this case, the Commissioner found based on credible evidence in the record that the Rent Administrator's order relying on the DHCR's inspector's report, properly directed the restoration of the required services and granted a rent reduction to the tenant. Moreover, the Commissioner stated that the record did not show proof of petitioner's claim that the tenant caused the conditions. The Commissioner properly credited the tenant's statements regarding the conditions where the tenant was corroborated by the DHCR's inspector report. Further, petitioner failed to submit any affidavits or documentation to corroborate his allegations that the tenant caused the conditions requiring repair or that the tenant refused access. Accordingly, it is argued, because credibility is for the Commissioner to decide, it was within his discretion and in accord with the record and the law for him to deny the petitioner's PAR.

In reply, petitioner reasserts and reiterates the factual bases in support of what it asserts is the credible evidence in support of its position, and the reasons why it believes the DHCR failed

to properly consider petitioner's proof. Petitioner has been vigilant in responding to the tenant's complaints over the years.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DHCR, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (CPLR 7803 (3); *see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts" (*Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974)). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Education*, 34 N.Y.2d at 231). The court's function is completed on finding that a rational basis supports the DHCR's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No. (356 N.Y.S.2d 833 (1974)), is instructive on the basic standard of Article 78 review:

> In article 78 proceedings: 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence. "' (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious." (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).
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> *Pell* at 839.

As to petitioner's argument that the DHCR misapplied the relevant statutes, the court is guided by the Court of Appeals in *Howard v Wyman* (28 N.Y.2d 434 (1971)), wherein the Court stated:

> It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (See, e.g., Matter of Mounting & Finishing Co. v. McGoldrick, 294 N. Y. 104, 108; Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 N. Y. 333, 338; Udall v. Tallman, 380 U. S. 1, 16-18; Power Reactor Co. v. Electricians, 367 U. S. 396, 408.) As this court wrote in the Mounting & Finishing Co. case (294 N. Y., at p. 108), "statutory construction is the function of the courts 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (Board v. Hearst Publications, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (Rochester Tel. Corp. v. U. S., 307 U. S. 125, 146)."

Howard at 434.

This court finds that the Commissioner's order reducing the tenant's rent due to the

petitioner's failure to maintain services was proper and rational based on the DHCR's finding that petitioner failed to sufficiently substantiate the allegations that the tenant caused some of the conditions or that the tenant refused access to make certain repairs. Further DHCR reasonably concluded that petitioner failed to submit credible evidence to support its claim that the tenant caused the conditions that required repairs, or denied petitioner access to effect the required repairs.

Finally, this court will not consider the arguments raised (i.e., the *de minimus* argument), or evidence submitted by petitioner in this Petition that were not raised before the administrative agency at the time the agency was considering this matter.

In light of this court's determination that the DHCR's determination had a rational basis in both the administrative record and the law, petitioner's application is denied, in its entirety.

It is therefore

ORDERED and ADJUDGED, that the application of petitioner Diagonal Realty, LLC, for a judgment, pursuant to CPLR 7808(3), reversing, annulling and setting aside Order, issued by Deputy Commissioner Paul Roldan, of defendant New York State Division of Housing and Community Renewal, on July 28, 2004, Docket No. RK-410015-RO, as arbitrary, capricious and in violation of the law, is denied and the proceeding is dismissed. It is further

ORDERED, that the application of respondent New York State Division of Housing and Community Renewal for an order confirming the Commissioner's determination, is granted. It is further

ORDERED, that the application of respondent New York State Division of Housing and Community Renewal for an order awarding costs, is denied. It is further

ORDERED, that counsel for respondent shall serve a copy of this order with notice of entry on petitioner within twenty (20) days of entry of this Order.

Dated: January 20, 2005

Hon. Carol R. Edmead, J.S.C.