SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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In the Matter of the Application of
1829 REALTY ASSOCIATES,

Petitioner, Decision and order

For a Judgement pursuant to Article 78
of the Civil Practice Laws & Rules

-against- Index No. 10298/06

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, March 5, 2007

Respondent,

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved pursuant to Article 78 of the CPLR seeking to reverse a determination made by respondents upholding an earlier determination and finding that the tenants are entitled to a reduction of rent. Respondents oppose the motion. Papers were submitted by all parties and after hearing arguments this court now makes the following determination.

Background

On December 13, 2004 thirty six tenants living at 1829 Caton Avenue in Kings County filed an application for a reduction in rent based upon a building-wide reduction of services. Specifically the tenants complained of twenty one violations, including the absence of the posting of emergency telephone numbers, a defective front door lock and "uniformed doorman due at 7 p.m. - no uniform - arrives 8:30-12 p.m. - sleeps 'while on duty', frequently absent, no replacement, weekend doorman - ditto." The petitioner responded

to those complaints and concerning the doormen answered that the complaint was unsupported. The hours of the doormen were noted to be from 7:00 AM-7:00 PM during weekdays and from 7:00 PM-7:00 AM on weekends. Moreover, the petitioner noted that the doormen "dress in an appropriate manner" and that "there is no requirement that the doormen wear uniforms" and that the complaint in this regard had no merit. Pursuant to that response, respondent sent a request for additional information and evidence on February 23, 2005 seeking "payroll records and time sheets for the past six months for the doorman" and answers to questions concerning whether the doorman wore a uniform and if so when that practice stopped. On March 10, 2005 the petitioner responded by noting that the doormen "do not keep time sheets" and included a 'Doorman-Payroll report' dated July 1- December 31, 2004 for one Stanley Williams as well as Ralph Elson. The respondent remained unsatisfied with those responses and sent an additional request dated June 2, 2005. The request stated "please submit payroll records for the past 6 months for the doormen. The evidence previously submitted...was redacted and no information could be used. (Need days and hours worked, and rate of pay)". On June 23, 2005 the petitioner responded that the weekend doorman, Stanley Williams had been terminated May 2, 2005. Furthermore, the petitioner enclosed the log book used by the doormen for both the weekday and weekend as well as visitor sign-in sheets for a two week period. Additionally, the petitioner included affidavits from both doormen wherein they specify their

hours of work each day and they both indicated that they attend their jobs "on a regular basis".

On August 18, 2005 the Rent Administrator issued an order finding that concerning nineteen areas of complaint services were maintained, however, concerning 'doormen hours' the services were not maintained. Specifically, the Rent Administrator noted that "this agency requested more than once, that the owner submit evidence necessary to determine that the doormen work the required hours. The owner failed to submit such information". The Rent Administrator concluded that a reduction of rent was proper and so ordered such reduction of rent.

The petitioner submitted two requests for reconsideration, both of which were denied. On September 30, 2005 the owner submitted a Petition for Administrative Review (PAR) arguing the Rent Administrator overlooked the affidavit's of the doormen as well as the log books all of which demonstrated the doormen worked the required hours. On February 3, 2006 the Deputy Commissioner denied the petitioner's application and affirmed the Rent Administrator's decision mandating a rent reduction. A request by the petitioner for reconsideration was denied and this Article 78 proceeding followed wherein petitioner argues the decision ordering a rent reduction was arbitrary and capricious and unfounded. The respondent argues such rent reduction was warranted, specifically because petitioner failed to abide by a specific request of respondent.

When reviewing an administrative determination such determination will not be vacated if the result was rational and not arbitrary and capricious (Pell v. Board of Education of Union Free School District, 34 NY2d 222, 356 NYS2d 833 [1974], Matter of Tobin v. Steisel, 64 NY2d 254, 485 NYS2d 730 [1985]). A determination of an administrative agency reviewing matters within its area of expertise is entitled to deference (Salvati v. Eimicke, 72 NY2d 784, 537 NYS2d 16 [1988]).

In this case there has been evidence presented that the decision rendered was arbitrary or capricious. The decision dated August 18, 2005 does not state the reason for concluding that the doormen services were not maintained. The decision merely notes that the owner failed to submit information requested. The court can only conclude that was the sole basis for that determination. This conclusion is supported by the fact that concerning the other complaints where respondent determined the services were maintained, specifically in connection with the intercom and buzzers, reasons and explanations were provided. Moreover, the second letter denying petitioner's request for reconsideration reiterates that petitioner failed to provide information requested and that a finding against petitioner was formed on that basis. The letter notes that "given the competing allegations and the nature of the other evidence and the failure of the owner to provide specifically requested information in the un-redacted payroll records, the finding of fact by the Rent Administrator

against the owner can not be said to be unreasonable. The failure to provide specifically requested evidence or provide an acceptable explanation for the failure to provide same, leads to the inference that the evidence if submitted would not support the position of the party failing to submit it."

This letter all but confirms that the decision was not based upon any rational evaluation of the evidence but rather based upon petitioner's failure to submit evidence requested. The letter does not state what the 'competing allegations' are or 'the nature of the other evidence' and it can surely not refer to the nineteen items which were listed as 'services maintained'. Thus, all the other evidence referred to can be nothing more than allegations of tenants, a reasonable basis, to be sure, but one that would require the respondent to provide explanations as to why those allegations were so compelling. The decision written pursuant to the PAR fares no better. In that decision, the Deputy Commissioner wrote "the owner's PAR does not establish any basis to modify or revoke the Administrator's determination, which was based on the owner's failure to provide the requested information of the doormen's working hours despite repeated requests for the same by the Administrator." Again, the PAR concludes that "based on the owner's failure to submit the requested information on the doormen's working hours and payroll records despite repeated requests for the same by the Administrator, that doormen services were not being maintained and properly ordered a rent reduction."

The respondent argues that "there was sufficient evidence in the record to find that the owner's statements were less than credible and the tenants' statements are considered credible evidence of a reduction" (see, Brief for Respondent, page 11). While that statement might be true that was not the basis upon which the respondent made its conclusions. In fact the respondent never states that it based its determination upon any credible evidence at all. The respondent further argues that "the evidence" submitted by petitioner "was not sufficient to rebut the other evidence in the record that the services were reduced. Moreover, it was not irrational for the Commissioner to credit the tenants' testimony and discredit the owner's testimony given that it was not forthcoming about providing the information requested" (see, Brief for Respondent, pages 12,13). Again, nowhere in any of the many decisions issued in this case does a determination rest upon any evidence introduced. Rather, as repeatedly explained, the conclusions of respondent are based upon one issue, the failure of the petitioner to supply information to the satisfaction of respondent. It is well settled that in administrative hearings a finding can only be based upon substantial evidence (300 Gramatan Avenue Associates v. State Division of Human Rights, 45 NY2d 176, 408 NYS2d 54 [1978]). Concerning the drawing of inferences, such as suggested in the letter denying petitioner reconsideration, the same court citing earlier cases noted that 'the determination is regarded as being supported by substantial evidence when the proof

is so substantial that from it an inference of the existence of the fact found may be drawn reasonably' (Id).

Thus, inferences may be utilized in administrative hearings but they must flow and complement the substantial evidence which exists, they cannot be used to highlight the absence of any evidence at all. Again, the respondent argues that "petitioner's failure to provide the documentation requested to sort out the hours worked by the doorman indeed gave a negative inference to its claim that the doormen services were inadequate. The petitioner has failed to demonstrate that DHCR's reliance upon the documentary evidence submitted by the tenants, without a physical inspection of the premises, was an abuse of discretion" ((see, Brief for Respondent, page 15). However, as noted numerous times, the DHCR did not rely upon 'documentary evidence submitted by the tenants' and never mentioned that as a conclusion for finding against the petitioner. This case is quite simple, some tenants complained that the doormen were not working their designated hours and the owner insisted that they were. The respondent requested that petitioner submit detailed time sheets and payroll records to try and ascertain whether the doormen worked the hours they were supposed to or were failing in that duty as alleged by the tenants. The information sought was designed to substantiate or help substantiate the petitioner's denials of the allegations and in that spirit petitioner submitted all the information available without compromising the salaries of the doormen. Such information

consisted of affidavit's, redacted payroll records and log books demonstrating presence on the job. The DHCR rejected the affidavits explaining they were 'self serving'. It should be noted that the statements of the tenants were self serving as well and the mere fact affidavits are self serving does not bar their use when evaluating a fact sensitive situation (Josephson v. Crane Club Inc., 264 AD2d 359 [1st Dept., 1999]). More importantly, the conclusions of respondent were not based upon 'evidence' or 'credibility' or 'inferences' but rather upon the failure of petitioner to submit information to the satisfaction of respondent. That was an arbitrary and capricious determination and it is hereby vacated.

The motion seeking to vacate the respondent's determinations is consequently granted.

So ordered.

ENTER:

DATED: March 5, 2007
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC