

**Matter of 445 E. 80th St. Tenants Assoc. v New York
State Div. of Hous. & Community Renewal**

2007 NY Slip Op 30571(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0110259/2006

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

In the Matter of 445 East 80th Street
Tenants Association

INDEX NO. 110259/06

MOTION DATE 12/1/06*

- v -

MOTION SEQ. NO. 001

The New York State Division of Housing and
Community Renewal

and

Clermont York Associates

UNFILED - JUDGMENT
This judgment has not been entered and notice of entry must be obtained in person at the County Clerk's Office (Room 141B).
MOTION CAL. NO. _____
*Fully submitted 2/20/07
County Clerk
To
PAPERS NUMBERED
must
Desk (Room

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this petition is granted as indicated below.

This Article 78 proceeding challenges respondent's order dated May 26, 2006 which was issued in connection with the petitioners' complaint seeking a rent reduction based on a claim that there was a lack of adequate ventilation in various apartments and public areas which constituted a failure to maintain services (Rent Stabilization Code § 2523.4). A prior Article 78 proceeding had challenged, among other things, respondent's determination dated April 8, 2004 with respect to the ventilation in the building. The details of that determination are set forth in

the court's order dated March 29, 2005, issued by Justice Carol Edmead under index number 115283/04. In her decision, Justice Edmead noted that DHCR had inspected 71 of the 94 apartments which were the subject of the complaint on six dates in February and May 2003, that all of the hallway vents were found to be operative and that inspectors found inoperative vents in 19 apartments. DHCR had denied the building-wide complaint, and opened individual dockets for the 19 apartments with inoperative vents and granted rent reductions for those units with the exception of two units where kitchen windows were found to be sufficient substitutes for the inoperative kitchen vents. DHCR had rejected the claim that additional apartments should have been granted rent reductions because their ventilation failed to meet Building Code requirements which are measured by airflow per cubic feet. In that determination, the Deputy Commissioner had found:

Current DHCR policy regarding ventilation complaints is that a rent reduction will be granted only when vents are found to be non-functional. DHCR does not have the technical expertise to enforce the New York City Building Code, and in any event, the purpose of the Building Code, as set forth therein, is to provide standards for regulating building "construction" (see NYC Building Code, Section 27-102), whereas housing maintenance is regulated by the provisions of the Housing Maintenance Code. If the tenants believe that the ventilation in certain apartments is in violation of local code, the proper procedure is to file Individual Apartment Applications for Rent Reduction along with a violations report from the appropriate municipal agency, upon which DHCR can make a proper assessment as to whether rent reductions are warranted.

[PAR decision, April 25, 2004, p. 3]

In her decision, Justice Edmead noted petitioners' argument that DHCR had previously applied the Building Code in a different proceeding challenging rent abatements due to inadequate ventilation in the same building. She found that in the proceeding before her, the Commissioner had explained the basis for the Building Code's inapplicability, but had not explained the reason

for departing from agency precedent that had applied the Building Code to complaints of inadequate ventilation. She concluded that the absence of such an explanation would require reversal of the determination on the law as arbitrary, and she reversed and annulled the determination and remanded it to DHCR for further proceedings.

The May 25, 2006 determination that was issued upon remand is the subject of this Article 78 proceeding.

In that decision, the Deputy Commissioner attempted to explain why he felt that the failure to utilize Article 27-768 (2) of the Building Code in this case was not a departure from agency precedent. He noted that in the other proceeding referenced by petitioners with respect to a claim of inadequate ventilation, the purpose of citing to the Building Code was to demonstrate that ventilation was not a required service because the Code did not require ventilation in kitchens which had a window. Respondent stated that "[a]lthough the entire code was cited, the agency did not utilize this section for the technical purpose of measuring airflow per cubic feet. The sole purpose of citing this section was to determine that the failure to have a functioning vent in any kitchen with a window did not constitute a decrease in service." (PAR determination dated May 25, 2006, p. 5).

It is evident that upon remand, DHCR abandoned its previous suggestion that the Building Code only applied to regulate building construction and did not apply to existing buildings. It acknowledged and reaffirmed its application of the Building Code to a previous complaint regarding inadequate ventilation, and expressly stated that "[t]he agency will utilize the Building Code and Housing Maintenance Code for the limited purpose of determining that ventilation is required in kitchens, bathrooms and common hallways, or as in docket number RJ410002-RK, to determine there is no ventilation requirement under those facts." (PAR determination, p. 5).

The Deputy Commissioner further stated that "[i]t has never been the

policy of the agency to utilize the anemometer readings to determine if the technical standards set forth by the Building Code or Housing Maintenance Code have been met. Instead, the agency will only determine a rent reduction exists if *no* air flow is measured from a given vent where ventilation is required." (PAR decision, p. 5, emphasis supplied). He cited two cases for his position that the failure to utilize the Building Code's technical standards for ventilation is not a departure from agency precedent and "in accord with the customary processing of these types of cases." (PAR determination, p. 5). However, those two cases, which have been provided to the court by petitioner, address the procedures that are to be employed with regards to complaints of inoperative vents, such as having inspectors personally inspect the vents and conduct air flow tests. They don't address the standard that is applied when the vents are inspected.

In sum, upon remand, DHCR retracted its suggestion made in its April 8, 2004 determination and ensuing Article 78 proceeding that the Building Code was not applicable to the building or the tenants' claim for rent reduction based on the failure to maintain services. However, it clung to its previous position that its only responsibility with respect to such a claim was to determine whether the ventilation system functioned on any level, and that if the tenants feel that the ventilation system is inadequate, they are required to obtain a finding from DOB or HPD before a rent reduction could be granted for that problem.

The court finds that this position lacks a rational basis. DHCR refers to the technical nature of the subject matter, and states that it has never been its policy to utilize anemometer readings to determine if the technical standards of the Building Code have been met. However, DHCR clearly has the technical expertise to take such readings because it did so when it inspected the subject apartments. Petitioner has annexed the inspection results to the petition. Those results reflect the readings obtained by DHCR's inspectors. DHCR only granted rent reductions to those apartments where

the vents had "O" airflow¹. No consideration was given to the adequacy of the airflow. This is an arbitrary position taken by an agency that has the statutory responsibility to determine whether there has been a failure to maintain services.

DHCR argues that the parties could not agree on the applicable standard for ventilation, and that this illustrates that DHCR should not resolve the issue or determine whether adequate ventilation is provided to the tenants. But disagreement between tenants and owners in proceedings before the DHCR are most likely not the exception, but the rule. That can't be a basis for DHCR to decline to make a determination necessary to resolve a complaint of inadequate ventilation. Nor is this court persuaded that DHCR is unable to understand or apply the requirements of the Building Code. As is aptly noted by petitioners' counsel, "[t]his is an agency which oversees complex rent claims involving mind-numbing calculations and which administers a byzantine regulatory system which the New York Court of Appeals has described as an 'impenetrable thicket.'" (Collins reply affirmation, p. 2).

Additionally, DHCR asserts that because RSC § 2523.4 (c) requires that applications for a rent reduction based upon adequate heat or hot water must be accompanied by a report from the appropriate agency finding such a lack of adequate heat or hot water, it is reasonable for DHCR to require such a finding with respect to a claim of inadequate ventilation. But there is no such requirement in that statute. And petitioners point out that while HPD prioritizes heat and hot water complaints and expeditiously responds to those complaints, there is no comparably expeditious approach to complaints of inadequate ventilation.

¹Petitioners allege that if the Building Code standards had been applied, 41 of the 71 apartments would have failed inspections. Under the "functioning at any level" standard employed by DHCR, only 17 of the apartments failed inspection.

Regarding petitioners' allegation that DHCR improperly permitted the owner to perform repairs to the system during the inspection, the court finds that it was not unreasonable or irrational for DHCR to permit such repairs to be made.

Based upon the foregoing, respondent's May 25, 2006 determination is reversed and annulled. The matter is remanded to respondent, who is to grant rent reductions to all those apartments who had inadequate ventilation as defined by the Building Code and Housing Maintenance Code.

Additionally, petitioner is awarded attorneys' fees pursuant to CPLR 8601. Petitioners are to submit the application pursuant to CPLR 8601 (b) to Part 13, 71 Thomas St., and to serve a copy of that application upon respondent, within 30 days after entry of this judgment. Respondent shall have the opportunity to make a responsive submission, which should be served upon petitioner and delivered to Part 13 within 30 days thereafter.

Dated: 3/30/07

SA-S
J.S.C.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).