

<b>Matter of AIMCO 240 W. 73rd St., L.L.C. v New York State Div. of Hous. &amp; Community Renewal</b>
2007 NY Slip Op 31396(U)
May 17, 2007
Supreme Court, New York County
Docket Number: 0114850/2006
Judge: Donna Marie Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

AIMCO 240 WEST 73<sup>RD</sup> STREET LLC, et al.,

Petitioners,

-against-

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL, et al.,

INDEX No. 114850/06

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL NO. \_\_\_\_\_

**THIS DOCUMENT IS THE PROPERTY OF THE COUNTY CLERK OF NEW YORK COUNTY. IT IS TO BE RETURNED TO THE CLERK'S OFFICE UPON REQUEST. FAILURE TO DO SO WILL BE CONSIDERED A VIOLATION OF ARTICLE 141B OF THE JUDICIAL BRANCH OFFICIALS' ETHICS. ANY PERSON WHO VIOLATES THIS ORDER SHALL BE SUBJECT TO DISCIPLINARY ACTION. ANY PERSON WHO VIOLATES THIS ORDER SHALL BE SUBJECT TO DISCIPLINARY ACTION. ANY PERSON WHO VIOLATES THIS ORDER SHALL BE SUBJECT TO DISCIPLINARY ACTION.**

The following papers, numbered 1 to \_\_\_\_\_ were read on this Article 78 motion.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2, 2A, 3

Replying Affidavits 3, 4, 5

CROSS-MOTION:        YES        NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 5-17-07

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

INDEX NO.  
114850/06

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In the Matter of the Application of  
AIMCO 240 WEST 73<sup>RD</sup> STREET, L.L.C. and  
AIMCO 240 WEST 73<sup>RD</sup> STREET CO-OWNER,  
L.L.C.,

Petitioner,

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

- against -

NEW YORK STATE DIVISION OF HOUSING  
& COMMUNITY RENEWAL, et al.,

Respondents.  
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**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).*

DONNA M. MILLS, J:

Petitioners AIMCO 240 West 73rd Street LLC and AIMCO 240 West 73rd Street Co-Owner LLC (together, AIMCO) bring this Article 78 proceeding to annul those portions of Administrative Review Order No. UB430027-RO (Order) of respondent New York State Division of Housing and Community Renewal (DHCR), issued on August 14, 2006, which denied AIMCO's petition for administrative review (PAR), and determined that AIMCO was required to provide maid and linen services to certain tenants at the subject premises. AIMCO is the owner of the building (Building), formerly the Commander Hotel and now the Temco Hotel, located at 240 West 73rd Street in Manhattan. The tenant intervenors-respondents counterclaim for attorney's fees.

The underlying DHCR proceeding commenced in September 1998, when 108 tenants of the Building signed an application for a rent reduction based upon decreased building-wide services, including maid services and linen services. After six days of hearings, held

in February and April 2005, Administrative Law Judge Alan G. Polak found, among other things, that on the base date, June 4, 1981, that is, the date on which the premises became subject to the Rent Stabilization Law (RSL) (see Administrative Code of City of NY § 26-501 et seq.), maid and linen services were, or should have been provided to the complaining tenants, and that the failure to provide those services ab initio to some of the complaining tenants, and the elimination of such services to others, could not be considered de minimis. At the time of the hearing, 63 of the initial complaining tenants, occupying 61 apartments in the Building, remained in residence. Following further proceedings, by order issued January 9, 2006, Rent Administrator (RA) S.L. McCray found, among other things, that maid and linen services had not been maintained, and ordered that, with exceptions that are not relevant here, the legal regulated rent be reduced to the level in effect prior to the most recent guidelines increase for each of the tenants' leases which commenced before the effective date of the order, that is November 1, 1998, and that no rent increases could be collected after the date of the order until the issuance of a subsequent order restoring the rent. The RA also ordered the owner to refund, again with exceptions not relevant here, any amounts in excess of the reduced rent, collected from tenants since the effective date of the order. Petitioner thereupon filed a petition for administrative review (PAR), challenging, among other things, the RA's findings with regard to maid and linen services. By order issued on August 14, 2006, Deputy Commissioner Paul A. Roldan

denied petitioner's PAR.

In this proceeding, AIMCO argues, primarily, that DHCR's finding that the failure to provide maid and linen services was not de minimis was arbitrary, and that that finding contravenes prior DHCR precedent, without any explanation for doing so.

As a general rule, the RSL and the Rent Stabilization Code (RSC) provide that where a landlord fails to maintain required services the legal regulated rent of the affected tenants is to be reduced. RSL § 26-514; RSC § 2523.4 (a). However, RSC § 2523.4 (e) provides that

[c]ertain conditions complained of as constituting a decrease in a required service may be de minimis in nature, and therefore do not rise to the level of a failure to maintain a required service for purposes of this section.

RSC § 2523.4 (e) then sets forth a non-exclusive schedule of conditions that "will generally not constitute a failure to maintain a required service," while also providing that "there may be circumstances where a condition, although included on the schedule will nevertheless be found to constitute a decrease in a required service." Neither maid service nor linen service appears on the schedule. With regard to conditions set forth on the schedule, as well as to conditions not so set forth, RSC § 2523.4 (f) provides that:

[i]n determining whether a condition is de minimis, the DHCR may consider the passage of time during which a disputed service was not provided and during which no complaint was filed by any tenant [emphasis added] alleging failure to maintain such disputed service, as evidencing that such service is de minimis, and therefore does not constitute a failure to maintain a required service, provided that:

(1) for purposes of this subdivision, the passage of four years or more shall be presumptive evidence that the condition is de minimis . . . .

Here, it is undisputed that four tenants who signed the application to DHCR, respondents/intervenors Melchior Gonzalez, Jonathen Koren, Davod Slater, and Eva Swain, moved into the Building in 1996, that is, approximately two years prior to signing the September 1998 complaint, and that these tenants were given neither maid nor linen services. Accordingly, inasmuch as the presumption that a condition is de minimis arises only where no tenant has complained of it within four years, the presumption does not arise here. Petitioners appear to argue in their initial papers that those respondents-intervenors whose leases stated that no maid or linen services would be provided had no right to such services. That argument fails because it is established that "[a]ny lease provision that subverts a protection afforded by the rent stabilization scheme is . . . void." Drucker v Mauro, 30 AD3d 37, 39 (1st Dept 2006) (citing cases). Pursuant to RSC §§ 2520.6<sup>®</sup>) and 2521.3 (a), maid and linen services were required services at the Building. Accordingly, DHCR's finding, that the failure to provide maid and linen services is not de minimis, is hardly irrational. The court notes that, even had the de minimis presumption been raised, it would not have been irrational for DHCR not to have given it effect, inasmuch as the RSC expressly requires that maid and linen services be provided to rent stabilized tenants of a hotel. See Windmere Hotel v New York State Div. of Hous. and Community Renewal, NY County Index No. 100230/07 (April 10, 2007,

Wilkins, J.).

Petitioners point out that, in an earlier administrative proceeding, Matter of Reddy (DHCR Adm. Rev. Dckt. No. PK410058-RT [2/28/02]), DHCR determined that, where a tenant failed to complain about the elimination of maid service for 24 years, such elimination of service was de minimis. However, it does not appear that Mr. Reddy had provided the RA in that proceeding with evidence that any other tenant had complained of the elimination of maid service, within four years of such elimination. Here by contrast, the tenants presented evidence of timely complaints to the ALJ, which evidence was reviewed by the RA. Accordingly, there is no discordance between DHCR's decisions in Matter of Reddy and in this proceeding.

Petitioners also contend that DHCR should have considered the issue of maid and linen services on an apartment-by-apartment basis, rather than on a building-wide basis. This was a proceeding commenced by more than 100 tenants concerning services that were required to be provided to all tenants of the Building on the base date. Petitioners have shown neither why an apartment-by-apartment consideration would have been more appropriate, nor how the result of such a consideration would have differed from the result here.

Petitioner's final argument, that the Order is not based upon substantial evidence, fails because it was not raised in petitioner's PAR. Moreover, CPLR 7803 (4), which provides that the issue of substantial evidence may be raised in an Article 78

proceeding, is applicable, by its terms, only to determinations "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law." See Matter of Johnson v State of New York, 26 AD3d 379 (2d Dept 2006); Matter of Augusta v Silva, 201 AD2d 405 (1st Dept 1994). In a proceeding to reduce the rent because of an owner's failure to maintain services, DHCR is authorized to hold a hearing at the request of any party, or on motion of the Commissioner. It is not, however, required to hold a hearing. RSL § 26-514; Adria Realty Inv. Assoc. v New York State Div. of Hous. and Community Renewal, 270 AD2d 46 (1st Dept 2000). Consequently, petitioner's reliance upon CPLR 7803 (4) is misplaced.

Respondents-intervenors contend that they are entitled to an award of their attorney's fees by virtue of RSL § 26-514 and Real Property Law (RPL) § 234. RSL § 26-514 provides that DHCR may assess attorney's fees against an owner who applies for a rent adjustment, pursuant to RSL § 26-510 (d), and who, in support of such application, knowingly files a false certification that he or she is maintaining all required services. RSL § 26-514 is wholly inapplicable here. RPL § 234, which implies a tenant's right to recover attorney's fees where the lease provides such a right to the landlord, applies only to actions and special proceedings; it does not apply to administrative proceedings. Matter of Chessin v New York City Conciliation and Appeals Bd., 100 AD2d 297 (1st Dept 1984). Consequently, RPL § 234 does not entitle the tenants to the attorney's fees that they incurred in the DHCR proceeding. Nor are

they entitled to the fees that they have incurred in this proceeding. RPL § 234 implies a tenant's right to fees incurred "as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease . . . ." The tenants have not shown that AIMCO has breached any of their leases. See Salvato v St. David's School, 307 AD2d 812 (1st Dept 2003).

Accordingly, it is hereby

ORDERED that the counterclaim is dismissed; and it is further ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

Dated: 5-17-07

ENTER:

  
\_\_\_\_\_  
J.S.C.

**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).