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

EMILY JANE GOODMAN

PART 17

Index Number : 101217/2006

40 PARK AVENUE TENANTS

vs

HOUSING & COMMUNITY RENEWAL

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 ~~motion~~ petition

THIS ~~MOTION~~ IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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).

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

Dated: 5/21/07

EJG

EMILY JANE GOODMAN, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
- -X

In the Matter of the Application of
40 PARK AVENUE TENANTS' ASSOCIATION,
ELLEN IMBIMBO, JOAN WEBER, JEAN SANDERS,
and all other members of the class
similarly situated as tenants of 40 Park
Avenue, New York, New York,

Petitioners,

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

-against-

STATE OF NEW YORK, DIVISION OF HOUSING
AND COMMUNITY RENEWAL, 40 PARK AVENUE,
LLC and RUDIN MANAGEMSNT COMPANY,

Respondents.
- -X

Index No. 101217/06

EMILY JANE GOODMAN, J.S.C.:

In this Article 78 proceeding, petitioners seek to annul the determination of respondent New York State Division of Housing and Community Renewal ("DHCR") dated December 8, 2005, which upheld a major capital improvement ("MCI") rent increase based upon exterior renovations to a residential apartment building.

Facts

Petitioner 40 Park Avenue Tenants' Association (the "Association") is an association representing rent stabilized tenants residing in apartments at 40 Park Avenue (the "Building"). Petitioners Ellen Imbimbo, Joan Weber and Jean Sanders are tenants of the Building. Respondent 40 Park Avenue

LLC (the "Owner") is the owner, and respondent Rudin Management Company ("Rudin") is the Building's managing agent.

The Building is nineteen stories, with 148 apartments, of which 68 are rent stabilized. It contains 88 steel balconies and fifteen terraces. The terraces are part of a roof system while the balconies are extensions of the various apartments. In 2000, after a large section of face brick fell onto the street below from one of the Building's balconies, Rudin retained a consulting engineer to plan a reconstruction of the balconies and terraces. During the course of the initial restoration work, Rudin determined that more extensive renovations were required and retained an architectural firm and a contractor to design and complete a comprehensive exterior restoration project. Once the work commenced, change orders for additional work were submitted. Apart from the replacement of balconies and terraces (including the removal and replacement of steel railing systems), the work included the removal and replacement of parapet walls, damaged face brick, deteriorated mortar, and a roofing system on the main roof penthouse terrace.

On July 15, 2003, the Owner filed with DHCR an MCI application seeking rent increases for each rent stabilized apartment based upon restoration work totaling $2,7681,070.64 plus a consulting fee of $77,293.06. Petitioners filed an answer on October 15, 2003. In it, they contended that the work did not

qualify because it was repair work necessitated by deferred maintenance, that the steel and concrete replacement should be excluded from the MCI calculations, and that certain work in the change orders did not relate to the exterior restoration. Petitioners also requested additional time to submit supplemental answers. In supplemental individual tenant submissions, many tenants claimed that the MCI was not warranted because some rent stabilized tenants do not have terraces (allegedly two dozen apartments), and of those who do have terraces, not all of them were repaired (see Ingrid McAlter letter, dated August 23, 2003, Ex A-8).

The Owner submitted a reply challenging petitioners' answers, claiming, among other things, that the work was not deferred maintenance or repair work, and that the work "inured to the benefit of all tenants (either directly or indirectly)" (see Owner's Reply to DHCR's "Requests for Additional Information/Evidence" dated February 13, 2004, Ex A-16). On October 7, 2004, DHCR's Rent Administrator ("RA") issued an order (the "RA Order") granting the MCI to the extent of directing a rent increase of $77.10 per room per month. The RA allowed $2,622,165.84 of the total claimed restoration cost of $2,681,070.84 and approved the consulting engineer's fee of $77,293.06 in its entirety. In making this determination, the RA excluded five change orders and a portion of a sixth, disallowing

costs relating to permits, painting, railings, gates, dividers and concrete testing.

Petitioners challenged the RA Order by filing a Petition for Administrative Review (the "PAR") on November 8, 2004, in which they reiterated substantially the same positions asserted in the answer to the Owner's original application. The Owner filed its answer on July 14, 2005. In an order dated December 8, 2005 (the "DHCR Order"), the Commissioner denied the PAR. As is relevant here, the Commissioner found:

> [W]ith regard to the tenants' assertion that the work was a result of deferred maintenance and repair work, the Commissioner notes that the record does not support these allegations. Nevertheless, the fact that the work may have been performed to correct defective conditions does not bar an owner's entitlement to an MCI rent increase, if the facts so warrant. Furthermore, upon the Commissioner's review of the totality of the record before the Division, the Commissioner finds that the Rent Administrator properly determined that the work qualifies for an MCI rent increase, and properly denied that part of the work and costs that are not MCI.
>
> The totality of the evidence concerning the instant application supports the owner's an entitlement to an MCI rent increase, and the Division is compelled to grant MCI rent increases when warranted. The Commissioner notes that the owner submitted necessary documentation which includes copies of contracts, change orders and canceled checks evincing payment to support its MCI rent increase application.

The instant Article 78 proceeding followed. The petition, styled as a class action on behalf of all Building tenants, seeks

annulment of the DHCR order on the grounds that a substantial portion of the MCI work was performed for repairs, and that the improvements were for the benefit of only certain tenants and not the tenant population as a whole.

Discussion

The Commissioner's determination to uphold the Rent Administrator's increases had a rational basis in finding that the exterior facade restoration was not deferred maintenance or repair work, even if some of it was performed to correct defective conditions. However, the agency's decision must be vacated on the basis that it was arbitrary and capricious for the agency to fail to consider or address petitioners' allegation that the improvements did not benefit all tenants directly or indirectly.

The dispute is governed by the provisions of the Rent Stabilization Code (9 NYCRR §§ 2530-2530(the "Code"), which was enacted by DHCR pursuant to §26-511(b) of the Rent Stabilization Law. Section 2522.4(a)(2) of the Code provides that a building owner may file an application seeking permission to increase the rent of each rent stabilized apartment based upon the completion of a major capital improvement. To qualify for an MCI increase, the improvements must (1) be "deemed depreciable under the Internal Revenue Code, other than for ordinary repairs," (2) be "for the operation, preservation and maintenance of the

structure," (3) which "inures directly or indirectly to the benefit of all tenants" and (4) meet the requirements of DHCR's useful life schedule (see Code §2522.4[a][2][i][a]-[d]).

To demonstrate that the work was other than routine repair and maintenance, "it must be shown that the work was performed as part of a unified plan or consecutively timed project" (Riverside Equities, LLC v DHCR, 292 AD2d 313 [1st Dept 2002]). An MCI increase may also be upheld "[i]n the absence of evidence of a failure to maintain required services" (Various Tenants of 40-66 Ithaca Street v DHCR, 238 AD2d 599, 599 [2d Dept 1997]). Where work is not done on a building wide basis and there are ample tenant complaints, an MCI increase is properly denied (CenPark Realty Co. v DHCR, 257 AD2d 543 [1st Dept 1999]). MCI costs must be supported by adequate documentation including at least one of the following: (1) cancelled checks contemporaneous with the completion of the work, (2) invoice receipts marked paid in full contemporaneous with completion of the work, (3) signed contract agreements, or (4) a contractor's affidavit indicating that the installation was completed and paid in full (see,DHCR Policy Statement 90-10; Clearwater Realty Co. v Yonac, 8 Misc3d 115 [Sup Ct App Term 2005]).

In reviewing DHCR's finding that the criteria for an MCI were met, the court is bound by the well-established rule that the determination of an administrative agency must be upheld

unless it lacks a rational basis (see, Matter of Pell v Bd. Of Educ., 34 NY2d 222 [1974]). Thus, "[a] determination by DHCR that an alteration constitutes an MCI necessarily entails the agency's expertise in evaluating factual data and is entitled to deference if it is not irrational or unreasonable" (Matter of West Village Assocs. v DHCR, 277 AD2d 111, 112 [1st Dept 2000], citing Ansonia Residents Assocs. v DHCR, 75 NY2d 206 [1989]; see, Mayfair York Co. v DHCR, 240 AD2d 158 [1st Dept 1997]). The court may not overrule the agency merely because it finds that the factual record could support a different conclusion (West Village, supra at 112; Brusco West 78th Street Assocs. v DHCR, 281 AD2d 165, 165 [1st Dept 2001][DHCR's MCI determination required to be upheld where "[a]t best, petitioner's evidence permitted a different finding with respect to a fact-intensive issue falling within the area of respondent's expertise"]).

Based upon a review of DHCR's records indicating that up through 2003 there had been no material tenant complaints regarding a decrease in building services, the Commissioner had a rational basis to conclude that the work did not consist merely of ordinary repairs necessitated by neglect. Although the petition cites certain anecdotal evidence, including a tenant's assertion to DHCR during the course of the MCI proceedings that leaks had been present in her apartment for 25 years, it is not

the court's function to weigh the proof and substitute its judgment for that of the agency.

Petitioners' related challenge to the sufficiency of the documentary evidence is also without merit. There is no allegation that the owner failed to timely submit materials requested by the agency (see, e.g., 985 Fifth Ave. Inc. v DHCR, 171 AD2d 572 [1st Dept 1991]), that the documentation supplied did not comply with DHCR Policy Statement 90-10, or that the owner otherwise failed to establish that the work was completed and paid for. Rather, petitioners suggest that DHCR should have concluded that certain change orders relating to steel, chimney, water tank, roofing and miscellaneous replacements actually represented non-qualifying repairs, or that the invoices failed to properly allocate between qualifying and non-qualifying work. Once, again, however, the court may not second-guess the agency's factual analysis. DHCR reviewed the record in its totality, including an affidavit from an Operations Manager explaining the change orders, and is entitled to deference with respect to those matters squarely within its expertise.

Furthermore, DHCR correctly found that MCI status was warranted even if some of the work was performed to correct defective conditions. The regulations do not exclude all work that might technically constitute some form of "repair." Only "ordinary" repairs are excluded (for instance, repairs which are

not part of a "unified plan" of improvement are excluded) (see, Riverside, supra). Work necessary to the "operation, preservation and maintenance" of the building is expressly included, whether or not it is partly in the nature of repair (see, 200 East 15th Street Tenants Assoc. v DHCR, Index No. 1000046/02 [Sup Ct, NY Co 2002](unpublished disposition)(tenants failed to show that extensive improvements undertaken to rectify building code violations were merely "ordinary repairs" and not for the operation, preservation and maintenance of the building"). Accordingly, petitioners' contention that all change orders and other documentation employing the word "repairs" should have been excluded is without merit.

Notwithstanding the above, the decision is vacated and remanded to the agency on the basis that the agency failed to consider or address petitioners' allegation that the work did not accrue "directly or indirectly to the benefit of all tenants" as required under Section §2522.4(a)(2)(i)(c). Work done to the facade of the Building qualifies as a building-wide improvement, even if the work was only done to a portion thereof (see, 430 East 86th Street Tenants Committee v DHCR, 254 AD2d 41 [1st Dept 1998] [upholding as rational DHCR determination to grant MCI status to work involving 80% of the building's parapets and masonry repairs]; Rudin Mgmt. Co., Inc. v DHCR, 215 AD2d 243 [1st Dept 1995][upholding as rational DHCR determination to grant MCI

status to work involving total replacement of masonry parapet on 20th floor of building]). However, the work at issue was not only done to secure the facade of the building, but improvements were made to individual terraces/balconies, which may have been unrelated to "operation, preservation and maintenance of the structure."

The Building contains 148 apartments, only 68 of which are rent stabilized. Of the 68 rent stabilized tenants, it is alleged that approximately two dozen apartments do not have terraces/balconies, and of those that do have terraces, not all of them were repaired. Therefore, a portion of the work appears to have benefitted only certain tenants--most of whom are not rent stabilized--while other tenants may not have received even an indirect benefit (see Riverton Assoc. v DHCR, 15 AD3d 225 [1st Dept 2005][MCI properly denied where renovation did not benefit the tenants]). The DHCR Order fails to mention this important issue when reciting petitioners' arguments for reversal, the owner's response thereto, and its rational for upholding the RA Order. Although the agency is entitled to deference, the blatant omission is arbitrary and capricious.[1]

Accordingly, it is

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[1]The court need not reach respondents' arguments regarding the propriety of class action relief. As the DHCR Order is vacated and remanded to the agency for review in accordance with the terms discussed herein, it is unnecessary to grant such relief.

ORDERED and ADJUDGED that the petition is granted, and the DHCR Order is vacated and remanded to the agency for review in accordance with the terms of this Decision, Order and Judgment.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: May 21, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN

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).